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## PETITION FOR A WRIT OF CERTIORARI

Petitioner James J. McMonagle respectfully requests issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.

## OPINION AND JUDGMENT BELOW

The August 15, 2005 opinion of the United States Court of Appeals for the Third Circuit (hereinafter "*Owens II*") is reported at 419 F.3d 195 and is reprinted in the attached appendix ("App.") at App. 1-36. That published opinion was amended by three unreported orders of the Third Circuit, dated August 23, 2005, September 2, 2005, and October 12, 2005. Those orders are reprinted at App. 37-38, 39-40, and 41-45, respectively. The September 28, 2005 unreported order of the Third Circuit denying rehearing *en banc* is reprinted at App. 68-69. The October 5, 2004 opinion of the United States District Court for the District of Delaware (hereinafter "*Owens I*") is reported at 316 B.R. 168 and is reprinted at App. 46-54.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 15, 2005. The Court of Appeals denied timely petitions for rehearing *en banc* on September 28, 2005. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The most commonly understood statutory foundation for the bankruptcy remedy of substantive consolidation, a remedy that was judicially created decades ago and that is at issue in this case, is section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105, which provides that "[t]he court

may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Federal Rule of Civil Procedure 52(a) provides that "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ."

## INTRODUCTION

With its decision in this case, the Court of Appeals for the Third Circuit became the tenth federal court of appeals to consider when it is appropriate to order "substantive consolidation" of the assets and liabilities of a bankrupt corporation and some or all of its corporate affiliates. The decision below conflicts with the decisions of other courts of appeals, imposes an excessively restrictive test in this respect, and warrants review by this Court.

As the Third Circuit itself recognized, "this area of law is difficult and this case important." App. 2. Substantive consolidation is a bankruptcy remedy, rooted in principles of equity, pursuant to which courts may pool the assets and liabilities of corporate affiliates so as to effectuate an efficient and equitable bankruptcy reorganization plan. The remedy "emanates from the core of bankruptcy jurisprudence," *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000), and the "question of when substantive consolidation is permissible has been the subject of much litigation, as well as learned discussion." App. 48. However, this Court has not yet provided guidance as to when substantive consolidation is appropriate. This lack of instruction and the consequent split among circuits has resulted in both jurisprudential confusion and uncertainty for creditors seeking to protect their rights when a large corporate debtor with subsidiaries or other affiliates enters bankruptcy.

Substantive consolidation is founded on a recognition that many mechanisms involving the use of corporate affiliates can be and are used advantageously by major

business enterprises, such as the utilization of separate subsidiaries for tax and other business purposes. *See Eastgroup Props. v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991) (substantive consolidation "has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures by subsidiary corporations operating under a parent entity's corporate umbrella for tax and business purposes."). Should a multi-corporate enterprise go into bankruptcy, there clearly exist some circumstances in which a bankruptcy court's equitable authority should be invoked to treat the enterprise, or a part of it, as a single entity through substantive consolidation. This conclusion has been acknowledged by every court of appeals that has considered the issue. The nature of the remedy flows straightforwardly from the character of the multi-corporation reorganizations to which it is applied: substantive consolidation "usually results in, *inter alia*, pooling the assets of, and claims against, the [multiple] entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the [separate] companies for purposes of voting on reorganization plans." *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988).

Thus, substantive consolidation promotes bankruptcy law's core policies of rehabilitating debtors and ensuring an equitable distribution of assets among creditors. *See id.* at 518 (the "purpose of substantive consolidation is to ensure the equitable treatment of all creditors"); *see also Bonham*, 229 F.3d at 764 ("The theory of substantive consolidation emanates from the core of bankruptcy jurisprudence. . . . The theme of the Bankruptcy Act is equality of distribution.") (internal quotations and citations omitted); *see, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 (1993) ("[T]he bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization."); *United States v. Whiting Pools*, 462 U.S. 198, 204 (1983) (noting "the congressional goal of encouraging reorganizations").

However, although bankruptcy courts have grappled for decades with when to order substantive consolidation, "[n]o uniform guideline for determining [the issue] has emerged." *Bonham*, 229 F.3d at 764. To the contrary, "[t]he reasons [offered by the] courts for allowing substantive consolidation . . . span the spectrum. . . ." App. 18; *see also id.* at App. 24 ("In assessing whether to order substantive consolidation, courts consider many factors. . . . They vary (with degrees of overlap) from court to court."); App. 49 (the standards "vary from circuit to circuit") (citation omitted).

Prior to the Third Circuit's decision herein, the circuits split primarily over which of "two similar but not identical tests" to use. *In re Reider v. FDIC*, 31 F.3d 1102, 1107 (11th Cir. 1994). The first is a two-part test – applicable with some variations in the D.C. Circuit, the Eighth Circuit, and the Eleventh Circuit – under which the proponent must make a *prima facie* case (1) that there is substantial identity between the relevant corporate entities, and (2) that consolidation is necessary to avoid harm or to realize a benefit. If these showings are made, then in order to defeat substantive consolidation, the opponent in these circuits must demonstrate (1) that it relied on the separate credit of one of the entities, and (2) that it will be prejudiced by consolidation. *E.g., In re Auto-Train Corp., Inc.*, 810 F.2d 270 (D.C. Cir. 1987); *Eastgroup Props.*, 935 F.2d 245. Even if the opponent is successful in this respect, however, the circuits following this approach further ensure that they are promoting the Bankruptcy Code's equitable purpose by authorizing consolidation if the demonstrated benefits of consolidation heavily outweigh the harm. *In re Auto-Train*, 810 F.2d at 276. By contrast, other circuits – principally the Second, Sixth, and Ninth – have focused essentially on whether (1) "creditors dealt with the entities as a single economic unit and 'did not rely on their separate identity in extending credit,'" or (2) "the affairs of the debtors are so entangled that consolidation will benefit all creditors." *E.g., Augie/Restivo*, 860 F.2d at 518; *Bonham*, 229 F.3d at 766. As indicated, there have been variations from circuit to circuit within these two camps.

The Third Circuit now has added to the confusion. While citing approvingly to the test utilized by the second camp, it has added an extreme measure of restrictiveness or even antagonism toward substantive consolidation that makes the remedy extraordinarily difficult if not impossible to invoke.

Under the Third Circuit's standard, proponents of consolidation must affirmatively prove that (1) before the bankruptcy petition, the debtor-related corporate entities "disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity," or (2) postpetition, those entities' "assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." App. 26. Opponents, by contrast, can defeat substantive consolidation by simply showing that they "are adversely affected and actually relied on debtors' separate existence"; they need not show that they relied on the separate *credit* of those corporations, as some circuits require. App. 27. As the Third Circuit frankly acknowledged, it would take a "nearly 'perfect storm'" of relevant factors to justify substantive consolidation under this test. App. 36. This new formulation essentially emasculates substantive consolidation as a remedy.

The petitioner herein, James J. McMonagle, is the legal representative of future tort claimants, many of whom will suffer grave injury to their health by virtue of asbestos-related torts for which Owens-Corning Delaware ("Owens Corning") and its subsidiary Fibreboard Corporation are responsible. App. 80-83. Present and future asbestos claimants collectively constitute by far the largest constituency in these Debtors' Chapter 11 cases. Indeed, the district court herein has estimated that the present and future asbestos claims against Owens Corning alone (*i.e.*, exclusive of Fibreboard) amount to approximately $7 billion. App. 67. Under the Third Circuit's test, however, those individuals' recovery from the bankrupt estate would be markedly diminished.

This Court has yet to address how the federal bankruptcy courts should determine when substantive consolidation is appropriate. Inasmuch as that question presents

significant issues with far-reaching consequences for the bankruptcy system, for debtors and creditors in reorganization cases, for structured finance transactions, and for the public interest, and inasmuch as the decision below adds to a broad and confusing conflict among numerous courts of appeals, the Court should grant certiorari and resolve the issue. Accordingly, petitioner respectfully asks that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## STATEMENT OF THE CASE[2]

Facing increasing asbestos-related tort litigation, Owens Corning and 17 of its wholly-owned subsidiaries (the "Debtors") jointly filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, in the United States Bankruptcy Court for the District of Delaware on October 5, 2000. At stake in this substantive consolidation dispute is the reallocation of what one group of creditors has represented to be at least $1 billion of value in the Owens Corning bankruptcy, much of which potentially could flow to the asbestos claimants – both present claimants and victims who in the future will manifest asbestos-related diseases. The principal litigants in this bankruptcy proceeding, in addition to the Debtors and petitioner, are a consortium of lenders represented by Credit Suisse First Boston (the "Banks");[3] the official representative of the bondholders and trade creditors; and the Official Committee of Asbestos Claimants, representing asbestos claimants who have already manifested asbestos-related diseases. App. 47.

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[2] The relevant facts and procedural history are set forth extensively in *Owens I* (App. 46-54) and are summarized by the Third Circuit in *Owens II*. App. 1-36.

[3] In addition to Credit Suisse First Boston, members of the lender consortium include Bear Stearns & Co., Inc., Loews Corporation, Societe Generale, Bank of America, JP Morgan Chase Bank, and Credit Lyonnais.

In conjunction with their plan of reorganization, the Debtors, along with the principal litigants except for the Banks (collectively, the "Plan Proponents"), sought substantive consolidation in the bankruptcy court. App. 46. The proposed reorganization plan filed by the Plan Proponents was premised on obtaining substantive consolidation of Owens Corning and its affiliates for purposes of the plan and the distributions to be made thereunder. *Id.* As with most substantive consolidations, this so-called "deemed consolidation" (as distinguished from an actual merger of the corporations in question under state law) would allow the Debtors to emerge from bankruptcy with their separate corporate identities intact and would equitably distribute the assets of the Owens Corning enterprise to creditors. App. 47.

The Banks objected to the proposed substantive consolidation.[4] Prior to commencement of its bankruptcy case, Owens Corning had in 1997 entered into a $2 billion unsecured credit agreement with the Banks, which was later reduced to $1.8 billion. *Id.* Pursuant to that credit agreement, the Banks made loan commitments to Owens Corning and certain of its subsidiaries in varying amounts, ranging from $10 million to $100 million. *Id.* Owens Corning guaranteed the repayment of all loans made pursuant to the credit agreement, whether to itself or to any subsidiary; and each major subsidiary (*i.e.*, each subsidiary with assets having a book value of $30 million or more) also guaranteed the repayment of all loans made pursuant to the agreement. App. 48. The claim of the Banks is for the unpaid balance on a series of loans made pursuant to the credit agreement. App. 47.

In opposition to the proposed consolidation, the Banks first argued that because substantive consolidation was

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[4] The objection was limited to the consolidation of only four Owens Corning subsidiaries, including Owens-Corning Fiberglas Technology, Inc., IPM, Inc., Integrex, and Exterior Systems, Inc. In other words, the Banks did not object to substantive consolidation of the other Owens Corning entities.

not consensual and would not meet state law requirements relating to piercing of the corporate veil, the bankruptcy court lacked authority to grant consolidation. In addition, the Banks contended that the cross-guarantees made by Owens Corning and its designated subsidiaries established that the Banks' claims are superior to the claims of all other creditors. App. 48. According to the Banks, the cross-guarantees constituted a direct claim against Owens Corning and each of the subsidiary guarantors, whereas the other creditors of Owens Corning only have indirect claims against the subsidiaries, based on Owens Corning's direct or indirect ownership of 100 percent of their stock. *Id.* In light of the cross-guarantees, the Banks argued, they would lose a preferred position conferred by the guarantees and thus would be treated unfairly if substantive consolidation were to occur. *Id.*

The Plan Proponents offered several forceful justifications for consolidation. Those justifications revolved around two critical facts. First, Owens Corning and its subsidiaries had operated, prepetition, as one integrated entity – *i.e.*, the debtors shared a "substantial identity." App. 50. Thus, the substantive consolidation of the Debtors would reflect the reality of their pre-bankruptcy business operations, which were controlled by the parent company's management as a single, integrated enterprise without regard to technical corporate structure. Second, and consistent with that point, it was to the credit status of the overall entity – rather than to the credit of each separately incorporated subsidiary or affiliate – that the Banks looked, and on which they relied, when they negotiated the credit agreement and made their loans. App. 51-52. Accordingly, the Plan Proponents showed, substantive consolidation would provide the Banks with exactly what they bargained for rather than unfairly depriving them of any legitimate advantage. App. 51-53. On the basis of these points, the Plan Proponents noted that consolidation was appropriate on at least the following grounds: (1) substantive consolidation would yield significant benefits and avoid significant harms by treating all creditors fairly and equitably; (2) consolidation would avoid the time-consuming

litigation that would be needed to evaluate, unwind, and resolve complex and voluminous inter-corporate claims as well as complex subsidiary evaluation and fraudulent transfer litigation regarding the subsidiaries' guarantees; and (3) consolidation would eliminate the prospect that, under separate plans, different creditor groups would control the subsidiaries and destroy the naturally symbiotic relationship between parent and subsidiary. *Id.*

Pursuant to 28 U.S.C. § 157(d), the District Court Judge, the Honorable Alfred Wolin, withdrew the reference of the substantive consolidation motion to the bankruptcy court, thus making the district court the judicial forum in which the motion proceeded. App. 73-79. Thereafter, Judge Wolin held a 13-day evidentiary hearing covering the Plan Proponents' substantive consolidation motion and the Banks' objections to the motion. App. 38. Judge Wolin was subsequently recused from the Debtors' bankruptcy cases (App. 71) and Judge John Fullam, Senior District Judge, was designated as Judge Wolin's replacement. App. 70. Upon his designation, Judge Fullam gave the parties an opportunity to present evidence in another hearing, but each of the parties declined this invitation.

After "read[ing] the transcript of the testimony," and "hav[ing] reviewed the voluminous documentary record compiled in the course of the hearing . . . and [with] the benefit of post-trial briefing and argument," Judge Fullam granted substantive consolidation on October 5, 2004. App. 46, 52. Effectively adopting the standard utilized by the D.C. Circuit and the Eleventh Circuit, Judge Fullam concluded that substantive consolidation was appropriate because the proponents had established a *prima facie* case for such consolidation. Specifically, he concluded that the proponents of substantive consolidation had demonstrated "(1) that there is substantial identity between the entities to be consolidated, and (2) that consolidation is necessary to avoid some harm or to realize some benefits." App. 49. Further, he found that the Banks had failed to establish "(1) that [they] relied on the separate credit of one of the

entities to be consolidated, and (2) that [they] will be prejudiced by substantive consolidation." App. 50.

Regarding the first part of the *prima facie* case for substantive consolidation, which involves the relationship "between the parent debtor . . . and its wholly-owned subsidiaries," Judge Fullam specifically found that "there is indeed substantial identity between the parent debtor [Owens Corning] and its wholly-owned subsidiaries":

- "All of the subsidiaries were controlled by a single committee, from central headquarters, without regard to the subsidiary structure."
- "Control was exercised on a product-line basis. For example, the president of the insulating systems business managed all aspects of the production, marketing, and distribution of insulation products, regardless of whether those products were manufactured in a factory owned by [Owens Corning] or by a foreign subsidiary."
- "The officers and directors of the subsidiaries did not establish business plans or budgets, and did not appoint senior management except at the direction of the central committee. . . ."
- "Subsidiaries were established for the convenience of the parent company, primarily for tax reasons."
- "All of the subsidiaries were dependent upon the parent company for funding and capital. The financial management of the entire enterprise was conducted in an integrated manner. No subsidiary exercised control over its own finances."

App. 50.

The district court also concluded that the proponents had established the second part of their *prima facie* case by showing that "consolidation is necessary to avoid some harm or to realize some benefits." App. 49-51. The court

noted in this connection that "substantive consolidation would greatly simplify and expedite the successful completion of this entire bankruptcy proceeding." Moreover, the court emphasized that "it would be exceedingly difficult to untangle the financial affairs of the various entities." App. 50.

Once he concluded that the proponents had established their *prima facie* case for substantive consolidation, Judge Fullam moved on to the issue of whether the Banks could meet their counter-burden to show "(1) that [they] relied on the separate credit of one of the entities to be consolidated, and (2) that [they] will be prejudiced by substantive consolidation." App. 50. He held that they had not. App. 51-52. Moreover, Judge Fullam concluded that "there is simply no basis for a finding that, in extending credit, the Banks relied upon the separate credit of any of the subsidiary guarantors," citing among numerous other reasons the following:

- "Each Bank's commitment was to the entire enterprise."
- "The decision as to whether funds would be borrowed by the parent company, or by one or more of the subsidiaries, was made by the borrowers, not by the lenders."
- "All of Owens Corning's financial reporting was done on a consolidated basis, and only that consolidated information was provided to the Banks."
- "[I]n seeking and obtaining guarantees from the 'substantial' subsidiaries, the Banks knew only that each guarantor had assets with a book value of $30 million or more; the Banks had no information about the debts of such subsidiaries."

App. 51.

Finally, Judge Fullam noted that, given the above facts, the Banks' claim that they would be prejudiced by substantive consolidation was without merit. And he emphatically concluded as follows: "It does seem to me

rather obvious that the interests of *all* parties would be best served by the prompt achievement of a reasonably acceptable plan of reorganization." App. 53 (emphasis in original).

The Banks appealed, and the Third Circuit in a panel decision reversed, while acknowledging that its decision conflicts with the decisions of several courts of appeals. App. 23 ("we disagree" with the approach of the D.C. Circuit). The court of appeals cited the approach of the Second, Sixth, and Ninth Circuits in somewhat favorable terms, while articulating its own test in a way that very sharply curtails the availability of substantive consolidation. As the court of appeals stated:

> In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

App. 26 (footnotes omitted). And in any event, the court added, opponents can defeat consolidation by showing simply that they are adversely affected and that they relied on the debtors' separate existence (as distinguished from their separate credit). App. 27.

This test was designed to be exceedingly restrictive. Whereas the Second Circuit's test in *Augie/Restivo* (for example) does not address burden of proof, the Third Circuit's decision places *all* burdens on the proponents of substantive consolidation. *See* App. 27 ("Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation."); *see id.* ("proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity."). By thus assigning burden, the decision below puts litigants favoring substantive consolidation in a position that is both exceptionally difficult and unprecedented. Additionally, the opinion

below expressly excludes tort plaintiffs from the first prong of its test: in assessing the issue of disregard of corporate separateness, the court concluded, "[tort and statutory claimants] are excluded, leaving only those creditors who contract with an entity for whom consolidation is sought." App. 27 n.21.

The court was candid that it imposed these restrictions because it believed that the remedy of substantive consolidation was "one of last resort." App. 26. Its opinion in fact frankly acknowledges that the proponents of substantive consolidation would have to show a "nearly 'perfect storm'" of pertinent considerations in order to meet the new test. And because petitioner and the other Plan Proponents could not show such a "storm," the court of appeals overturned the district court's order granting substantive consolidation.

In addition to establishing an exceedingly restrictive test designed to deny substantive consolidation in almost all circumstances, the court of appeals also disregarded the district court's findings of fact, even though it did not assess whether they were "clearly erroneous" as required by Federal Rule of Civil Procedure 52(a). Rather than applying the "clearly erroneous" standard, the court merely concluded that Judge Fullam's factual findings were "incorrect." App. 29. Specifically, the court set aside as "incorrect" the district court's specific factual findings concerning (1) the prepetition interrelationship of Owens Corning and its subsidiaries, and (2) the prepetition expectation of the Banks in obtaining guarantees. *Id.* The court did not in any way address or explain its disregard of Rule 52(a). Nor did it remand the matter to the district court for new findings of fact related to the legal standard enunciated in its decision, despite the fact that those factual issues were sharply contested.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW EXACERBATES THE SPLIT AMONG CIRCUITS REGARDING SUBSTANTIVE CONSOLIDATION

In recent years, most of the federal courts of appeals have wrestled with determining when the remedy of substantive consolidation should be invoked. Ten circuits have expressed an opinion on this issue. *See Owens II* (App. 1-36); *Bonham*, 229 F.3d 750; *First Nat'l Bank v. Giller (In re Giller)*, 962 F.2d 796 (8th Cir. 1992); *First Nat'l Bank of Barnesville v. Rafoth*, 974 F.2d 712 (6th Cir. 1992); *Eastgroup Props.*, 935 F.2d 245; *Augie/Restivo*, 860 F.2d 515; *Auto-Train*, 810 F.2d 270; *Pension Benefit Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983); *FDIC v. Hogan*, 593 F.2d 921 (10th Cir. 1979); *DeWitt Truck Bros., Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684-690 (4th Cir. 1976); *In re Pittsburgh Rys. Co.*, 155 F.2d 477 (3d Cir. 1946); *Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942). This substantial judicial attention to substantive consolidation is hardly surprising, inasmuch as the issue has serious consequences for the bankruptcy system, for multi-corporate enterprises, for creditors (including tort claimants), for parties engaged in structured finance transactions, and for the general public. *Augie/Restivo*, 860 F.2d at 518, citing *Flora Mir Candy Corp. v. RS Dickson & Co.*, 432 F.2d 1060, 1062 (2d Cir. 1970) ("[courts] have stressed that substantive consolidation 'is no mere instrument of procedural convenience . . . but a measure vitally affecting substantive rights.'"); *see also Bonham*, 229 F.3d at 761 and *Reider*, 31 F.3d at 1108.

The broad divergence among the circuits on this significant issue calls out for resolution by this Court. As one commentator has noted:

> Courts appear to analyze substantive consolidation under a variety of different tests and with an eye toward protecting various reliance interests. Yet these approaches are little more than legitimating devices for an ad hoc application of a doctrine that significantly affects corporate risk

> allocation. A doctrinal analysis of substantive consolidation can only provide an illustration of how difficult it is to predict instances in which it will be applicable. The only guide to predicting case outcomes is a general impression that courts harbor some vague concerns about protecting creditor expectations. The primary difficulty with substantive consolidation is that its application is uncertain and unprincipled.

Christopher W. Frost, *Organizational Form, Misappropriation Risk, and The Substantive Consolidation of Corporate Groups,* 44 Hastings L.J. 449, 461 (1993).

The decision below acknowledges the existence of essentially two lines of authority: "Ultimately most courts [have] slipstreamed behind two rationales – those of . . . the D.C. Circuit in *Auto-Train*" and those of "the Second Circuit in *Augie/Restivo*. . . ." App. 19. The first line of decisions (which we will sometimes refer to as the "*Auto-Train*" line) holds, with some variations, that substantive consolidation is appropriate if there is substantial identity among the corporate entities in question and if consolidation would avoid some harm or achieve some benefit. The second line (or the "*Augie/Restivo*" line) essentially, though again with some variations, permits consolidation if creditors dealt with the relevant entities as a single economic unit or if their affairs are so entangled that consolidation would benefit all creditors.

The District of Columbia Circuit, the Eighth Circuit, and the Eleventh Circuit follow the first approach. *See Auto-Train*, 810 F.2d 270; *Giller*, 962 F.2d 796; *Eastgroup Props.*, 935 F.2d 245. Within this group, the D.C. Circuit and the Eleventh Circuit follow the same two-part test. *See Auto-Train*, 810 F.2d 270; *Eastgroup Props.*, 935 F.2d 245. First, the proponent of consolidation must make a *prima facie* case, demonstrating (1) that there is "substantial identity between the entities to be consolidated; and (2) that consolidation is necessary to avoid some harm or realize some benefit." *Eastgroup Props.*, 935 F.2d at 249; *see also Auto-Train*, 810 F.2d at 276. If the proponent makes this showing, "the burden shifts to an objecting

creditor to show that (1) it relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by consolidation." *Eastgroup Props.*, 935 F.2d at 249. Even if the opponent makes this showing, the court may order consolidation if the demonstrated benefits heavily outweigh the harm. *Id.* Similarly, but not identically, the Eighth Circuit's test considers "(1) the necessity of consolidation due to interrelationship among debtors; (2) whether the benefits of consolidation outweigh the harm to creditors; and (3) prejudice resulting from not consolidating the debtors." *Giller*, 962 F.2d at 799.

By contrast, the Second Circuit, the Sixth Circuit, and the Ninth Circuit have followed the second and somewhat different approach. *See Augie/Restivo*, 860 F.2d 515; *Rafoth*, 974 F.2d at 712, 720; *Bonham*, 229 F.3d 750. The Second and Ninth Circuit follow a single formulation of the test. *See Augie/Restivo*, 860 F.2d 515; *Bonham*, 229 F.3d 750. These Circuits consider (1) "whether creditors dealt with entities as a single economic unit and did not rely on separate identity in extending credit," and, alternatively, (2) "whether the affairs of the debtors are so entangled" that consolidation will benefit all creditors – though either factor is sufficient to justify consolidation. *Augie/Restivo*, 860 F.2d at 518; *see also id.* at 518-19 ("With respect to the first factor, creditors who make loans on the basis of the financial status of a separate entity expect to be able to look to the assets of their particular borrower for satisfaction of that loan"); *id.* at 519 (with regard to "the second factor, entanglement of the debtors' affairs," substantive consolidation "should be used only after it has been determined that all creditors will benefit because untangling is either impossible or so costly as to consume the assets."); *Bonham*, 229 F.3d at 766 ("The presence of either factor is a sufficient basis to order substantive consolidation."). Similarly, the Sixth Circuit focuses on whether "the interrelationships of the debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all creditors." *Rafoth*, 974 F.2d at 720.

Unlike the first line of cases, the decisions of these circuits do not clearly state whether the proponents or the opponents of substantive consolidation must carry the burden of proof. Instead, they merely direct careful review: "only through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors." *Bonham*, 229 F.3d at 765.

While for the most part tilting toward the second of these lines of authority – *i.e.*, the *Augie/Restivo* line – the decision below articulates a notably more stringent test for determining whether substantive consolidation is appropriate. According to the Third Circuit's decision, the proponents of consolidation must prove that "(i) prepetition [the debtors] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) post-petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." App. 26. In setting forth this test, the Third Circuit expressly rejected the approach taken in *Auto-Train* and other decisions by the D.C. Circuit and the Eleventh Circuit. App. 23 ("To us [the D.C. Circuit's approach] fails to capture completely the few times substantive consolidation may be considered. . . . For example, *we disagree* that [i]f a creditor makes [a showing of reliance on separateness], the court may order consolidation . . . [even] if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm.") (emphasis added).

At the same time, whereas both lines of preexisting authority "ratified substantive consolidation in a variety of circumstances," *Bonham*, 229 F.3d at 764, the decision below embodies considerable negativity toward substantive consolidation generally. The Third Circuit recognized that "[t]he reasons of these courts for allowing substantive consolidation as a possible remedy span the spectrum and often overlap." App. 18. Indeed, it acknowledged that both lines of authority, though differing from one another, reflected "a 'modern' or 'liberal' trend toward allowing substantive consolidations." App. 22 n.15 (citing *Eastgroup*

*Props.*, 935 F.2d at 249). In direct opposition to that trend, however ("*we disagree* with the assertion of a liberal trend toward increased use of substantive consolidation"), *id.* at App. 22 n.15 (emphasis added), the Third Circuit adopted a test that makes it extremely difficult, if not almost impossible, to obtain substantive consolidation.

For instance, the first prong of the Third Circuit's new test requires the proponents of consolidation to prove that, prior to the bankruptcy petition, the debtor corporations "disregarded separateness so significantly [that] their creditors relied on the breakdown of entity borders and treated them as one legal entity." App. 26. This test not only requires extreme conduct by the debtors, but ironically almost negates the need for substantive consolidation. If the debtor companies in fact disregarded corporate formalities so substantially that creditors are misled, as suggested by the Third Circuit's test (App. 26, n.19), other remedies probably would be available, such as piercing the corporate veil – thereby eliminating the need for substantive consolidation. *See* App. 15 ("Prior to substantive consolidation, other remedies for corporate disregard were (and remain) in place."); *see, generally*, I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496 (1912).

Further, the first prong of the test as stated in the decision below requires a reliance inquiry that makes it easier to defeat substantive consolidation in the Third Circuit than in any other circuit. Specifically, the test assesses whether "the credit decision was made in reliance on the *existence* of separate entities." App. 31 (emphasis added). This is a divergence from the reliance inquiry established even under the second or *Augie/Restivo* line of preexisting authority, which focuses on whether lenders relied on the *credit* of the separate entities, not on the mere *existence* of the separate entities. *Bonham*, 229 F.3d at 766 ("[R]eliance on the separate *credit* of the entity is based on the consideration that lenders structure their loans according to their expectations") (emphasis added); *see also Augie/Restivo*, 860 F.2d at 518; *Reider*, 31 F.3d at 1106-1107. Even sharper is the contrast in this respect

with the first line of authority. According to the reliance test as it was articulated in *Auto-Train* and the other previously decided cases constituting that line of authority, the fact that entities held themselves out as separate was insufficient to show reliance. *See Eastgroup Props.*, 935 F.2d at 249. Moreover, in *Eastgroup Props.*, the court concluded that "[e]ven if an objecting creditor establishes reliance in fact, it may be estopped from asserting this defense to consolidation where a reasonable creditor in a similar situation would not have relied on the separate credit of one of the entities to be consolidated." 935 F.2d at 249 n.11. Thus, under *Eastgroup Props.*, substantive consolidation may be ordered even where a creditor relied on the "separate credit of one of the entities to be consolidated," if that reliance was not reasonable. *Id.* The decision below reflects no such principle.[5]

The second prong of the Third Circuit's test authorizes substantive consolidation only if, postpetition, the debtor's assets and liabilities are "so scrambled that separating them is prohibitive and hurts all creditors." App. 26. This prong also is extremely restrictive. The Third Circuit asserted that "commingling justifies consolidation only when separately accounting for assets and liabilities of the distinct entities will reduce the recovery of *every creditor* – that is, when *every creditor* will benefit from the consolidation." App. 31-32 (emphasis added). By requiring that literally every creditor benefit from substantive consolidation in order to justify it, the Third Circuit again makes achieving such consolidation under the second prong of its test extremely difficult if not impossible.

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[5] Under the Third Circuit's formulation, moreover, consolidation may be defeated even if a creditor that extended credit to a separate entity based its reliance not on the credit of the separate entity but on the overall credit of the interrelated enterprise. Here, the district court found specifically that the Banks relied on the "overall credit of the entire Owens Corning enterprise" rather than on the separate credit of the subsidiaries to which they extended credit. App. 51.

The reality of the Third Circuit's decision as a virtual bar to substantive consolidation is confirmed by its emphasis on the view that, while the principles articulated in the decision designed to restrict consolidation are generally applicable in bankruptcy cases, they are especially applicable to so-called "deemed" consolidations. *See* App. 35 ("perhaps the flaw most fatal" to consolidation is that "the consolidation sought was 'deemed' (i.e., a pretend consolidation for all but the Banks")). The Court went so far as to assert that "a 'deemed' consolidation cuts against the grain of all the principles [underlying substantive consolidation.]" App. 28. And in a rhetorical flourish, the Court concluded: "Such 'deemed' schemes we deem not Hoyle." *Id.*

But almost all substantive consolidations are "deemed" consolidations – *i.e.*, they do not effectuate an actual merger or consolidation of the relevant companies as a matter of state corporate law. *See In re Deltacorp, Inc.*, 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995); *In re GC Cos., Inc.*, 274 B.R. 663, 672 (Bankr. D. Del. 2002). The very nature of the remedy is to deem the entities consolidated, so that the assets and liabilities of separate debtors may be treated as those of a single entity for the purpose of the plan of reorganization and distributions thereunder in order to achieve equity. For this reason also, the decision below means that in the Third Circuit substantive consolidation will rarely if ever be available as a remedy.

The decision additionally ignores or distorts some of the fundamental policies underlying bankruptcy law. The panel opinion states that "[t]he concept of substantively consolidating separate estates begins with a commonsense deduction. Corporate disregard as a fault may lead to corporate disregard as a remedy." App. 15. Thus, the first prong of the court's new test may plausibly be seen as authorizing redress for corporate malfeasance. However, "[t]he sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors," *Augie/Restivo*, 866 F.2d at 518 – regardless of whether the debtor is guilty of any wrongdoing. Other courts of appeals have granted substantive consolidation without

any requirement of improper conduct by the debtor. *See, e.g.*, *Eastgroup Props.*, 935 F.2d at 248-249 ("There is, however, a 'modern' or 'liberal' trend toward allowing substantive consolidation, which has its genesis in the increased judicial recognition of the widespread use of interrelated structures by subsidiary corporations operating under a parent entity's corporate umbrella for tax and business purposes."); *In re Continental Vending*, 517 F.2d 997, 1000 (2d Cir. 1975) (court affirmed substantive consolidation where "interrelationships of the corporate group are highly complex, or perhaps untraceable" and creditors of the consolidated entities treated the entities as a unit); Patrick C. Sargent, *Bankruptcy Remote Finance Subsidiaries: The Substantive Consolidation Issue*, 44 Bus. Law. 1223, 1229 (1989) ("Not all cases of injustice to creditors involve a fraudulent debtor. In some instances the court will mete out equity to avoid benefiting one creditor to the detriment of another.").

The Third Circuit's decision thus has muddied even further what was already an uncertain and confusing area of bankruptcy law. Added now to the already existing split among circuits is a standard for determining when substantive consolidation is appropriate that is cramped in the extreme, perhaps to the point of making consolidation an essentially extinct remedy in the Third Circuit (which of course includes Delaware, under whose law many major national companies are incorporated). This acute restrictiveness, as compared even with the preexisting Second, Sixth, and Ninth Circuit authority that it in some measure follows, is no accident. The Court of Appeals was driven by a belief that the remedy should be "one of last resort" that can be awarded only if proponents of consolidation can show a "nearly 'perfect storm'" of converging factors. The Third Circuit's decision hence is a further departure in an area already marked by a conflict among circuits, and its direct rejection of the "modern trend" toward giving substantive consolidation "liberal" application warrants this Court's review.

## II. THE QUESTIONS PRESENTED ARE ISSUES OF SUBSTANTIAL AND RECURRING IMPORTANCE

The Third Circuit's opinion acknowledges the significance of the issue it decided. App. 2 ("[T]his area of law is difficult and this case important"). Because substantive consolidation vitally affects the rights and interests of parties involved in many substantial bankruptcy proceedings, it has been accurately termed a matter "pregnant with consequence." J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 Vand. L. Rev. 207, 208 (1990), quoting *In re Commercial Envelope Mfg. Co.*, 14 Collier Bankr. Cas. (MB) 191, 193 (Bankr. S.D.N.Y 1977).[6]

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[6] During the last 25 years alone, substantive consolidation has been addressed in at least the following decisions: *In re Am. Homepatient, Inc.*, 298 B.R. 152 (Bankr. M.D. Tenn. 2003); *In re Cent. European Indus. Dev. Co.*, 288 B.R. 572 (Bankr. N.D. Cal. 2003); *In re NII Holdings, Inc.*, 288 B.R. 356 (Bankr. D. Del. 2002); *In re GC Cos., Inc.*, 274 B.R. 663 (Bankr. D. Del. 2002); *In re Horsley*, No. 99-30458 JAB, 2001 WL 1682013 (Bankr. D. Utah Aug. 17, 2001); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510 (W.D. Tex. 2000); *In re Affiliated Foods, Inc.*, 249 B.R. 770 (Bankr. W.D. Mo. 2000); *Feltman v. Dailey (In re Am. Way Serv. Corp.)*, 229 B.R. 496 (Bankr. S.D. Fla. 1999); *In re Limited Gaming of Am.*, 228 B.R. 275 (Bankr. N.D. Okla. 1998); *In re Optical Techs., Inc.*, 221 B.R. 909 (Bankr. M.D. Fla. 1998); *Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.)*, 213 B.R. 870 (Bankr. D. Kan. 1997); *In re Leslie Fay Cos.*, 207 B.R. 764 (Bankr. S.D.N.Y. 1997); *White v. Creditors Serv. Corp. (In re Creditors Serv. Corp.)*, 195 B.R. 680 (Bankr. S.D. Ohio 1996); *Bracaglia v. Manzo (In re United Stairs Corp.)*, 176 B.R. 359 (Bankr. D. N.J. 1995); *In re Standard Brands Paint Co.*, 154 B.R. 563 (Bankr. C.D. Cal. 1993); *In re Cooper*, 147 B.R. 678 (Bankr. D. N.J. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723 (Bankr. S.D.N.Y. 1992); *Bruce Energy Ctr. Ltd. v. Orfa Corp. of Am. (In re Orfa Corp. of Philadelphia)*, 129 B.R. 404 (Bankr. E.D. Pa. 1991); *In re Murray Indus., Inc.*, 119 B.R. 820 (Bankr. M.D. Fla. 1990); *In re Apex Oil Co.*, 118 B.R. 683 (Bankr. E.D. Mo. 1990); *Kroh Bros. Dev. Co. v. Kroh Bros. Mgmt. Co. (In re Kroh Bros. Dev. Co.)*, 117 B.R. 499 (W.D. Mo. 1989); *In re Baker & Getty Fin. Servs., Inc.*, 78 B.R. 139 (Bankr. W.D. Ohio 1987); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. W.D. Ohio 1987); *Murphy v. Stop & Go Shops, Inc. (In re Stop & Go of Am., Inc.)*, 49 B.R. 743 (Bankr. D. Mass. 1985); *In re Crabtree*, 39 B.R. 718 (Bankr. E.D. Tenn.

(Continued on following page)

Not only has substantive consolidation produced sharp division among the federal courts of appeals, it has also inspired a diverse body of academic debate and commentary.[7] In addition, the importance of the issue to the business community is reflected in a host of relevant articles in practitioner-oriented journals.[8] Like the courts of appeals, moreover, academic commentators are irreconcilably divided. *Compare* Ryan W. Johnson, *The Preservation of Substantive Consolidation*, 24-Aug Am. Bankr. Inst. J. 44,

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1984); *In re Lewellyn*, 26 B.R. 246 (Bankr. S.D. Iowa 1982); *In re F.A. Potts and Co., Inc*, 23 B.R. 569 (Bankr. E.D. Pa. 1982); *In re Manzey Land & Cattle Co.*, 17 B.R. 332 (Bankr. D. S.D. 1982); *In re Richton Int'l Corp.*, 12 B.R. 555 (Bankr. S.D.N.Y. 1981); *In re 1438 Meridian Place, N.W., Inc.*, 15 B.R. 89 (Bankr. D.D.C. 1981).

[7] *See* David Skeel, Jr., *Corporate Anatomy Lessons*, 113 Yale L.J. 1519, 1568 (2004); Douglas G. Baird, *Secured Credit and Its Uncertain Future*, 25 Cardozo L. Rev. 1789 (2004); Christopher J. Predko, Note, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy*, 41 Wayne L. Rev. 1741 (1995); Christopher W. Frost, *Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups*, 44 Hastings L.J. 449 (1993); Jeanne MacKinnon, *Substantive Consolidation: The Back Door to Involuntary Bankruptcy*, 23 San Diego L. Rev. 203 (1986).

[8] *See* Bruce H. White & William L. Medford, *Substantive Consolidation Redux: Owens Corning*, 24-Nov Am. Bankr. Inst. J. 30 (2005); Ryan W. Johnson, *The Preservation of Substantive Consolidation*, 24-Aug Am. Bankr. Inst. J. 44 (2005); J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427 (2000); Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, *Structured Financing Techniques*, 50 Bus. Law. 527 (1995); Robert W. Schupp, *Substantive Consolidation: The Evolution and Use of an Equitable Power*, 96 Com. L.J. 418 (1991); Patrick C. Sargent, *Bankruptcy Remote Finance Subsidiaries: The Substantive Consolidation Issue*, 44 Bus. Law. 1223 (1989); William H. Thornton, *The Continuing Presumption Against Substantive Consolidation*, 105 Banking L.J. 448 (1988); Baker Ostrin, *A Proposal to Limit the Availability of Substantive Consolidation of Solvent Entities with Bankrupt Affiliates*, 91 Com. L.J. 351 (1986); Charles M. Tatelbaum, *The Multi-Tiered Corporate Bankruptcy and Substantive Consolidation – Do Creditors Lose Rights and Protection?*, 89 Com. L.J. 285 (1984); Benjamin Weintraub & Alan N. Resnick, *Consolidation in Bankruptcy Reorganization of Multi-tiered Corporations – Chemical v. Kheel Revisited*, 14 UCC L.J. 177 (1981).

64 ("[S]ubstantive consolidation fits within the traditional boundaries of equitable relief inasmuch as it is closely analogous to veil-piercing type theories"), *with* J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427, 451 (questioning the continuing vitality of "[t]he equity power foundation upon which substantive consolidation is premised").

The frequent academic discussion of substantive consolidation hardly comes as a surprise, inasmuch as the issue is a fundamental and recurring one in bankruptcy law with very significant consequences. *See Augie/Restivo*, 860 F.2d at 518 ("[S]ubstantive consolidation . . . [is] a measure vitally affecting substantive rights."). This point is vividly illustrated here.

As mentioned previously, this case concerns the reallocation of what the Banks have represented to be at least $1 billion in value in the Owens Corning bankruptcy, much of which would, under substantive consolidation, flow to asbestos claimants – a class consisting by definition of victims of Owens Corning's and Fibreboard's conduct. The decision below gives those persons short shrift, as we have noted. App. 27 n.21. ("[Tort and statutory claimants] are excluded" under the first prong of the Third Circuit test). Because the first prong of the Third Circuit's test expressly excludes tort creditors and the second prong makes substantive consolidation virtually impossible to obtain, the decision below has effectively excluded tort claimants from the equation altogether. This is a drastic result, especially when courts have found, as a "benefit of substantive consolidation," that proposed plans of reorganization can create "a fund so that the immediate needs of many asbestos claimants in dire straits can be attended to upon confirmation." *In re Eagle-Picher Indus., Inc.*, 192 B.R. 903, 907 (Bankr. S.D. Ohio 1996). The goal of concluding the Owens Corning bankruptcy cases expeditiously via substantive consolidation is particularly important given the numerous sick and dying asbestos victims who have long been awaiting compensation for their injuries. *See In re Kensington Int'l Ltd.*, 353 F.3d 211, 219, 224 n.13 (3d Cir. 2003) (describing representation that

"approximately 30,000 of the asbestos claimants in the five [formerly consolidated] asbestos [cases] have died from asbestos-related diseases since the cases were filed and . . . statistics would reveal that 15 asbestos-related victims would die each day.").

The decision below thus cuts against the policy grain of a substantial strand of academic analysis of substantive consolidation. As one leading commentator has noted:

> [U]nlike voluntary creditors, tort claimants are unable to bargain for protection against, or compensation for, the increased risk limited liability [of the separate companies within a multi-corporate enterprise] imposes. Because voluntary creditors theoretically can bargain for protection against any increase in risk caused by limited liability, these creditors may have less of a need for the protection substantive consolidation provides.

Frost, *supra*, at 452-53. Contrary to the Third Circuit's conclusion, the benefit to tort claimants arising from the expeditious resolution of bankruptcy proceedings surely is a factor courts should be permitted to balance in determining whether to grant substantive consolidation.

In addition, the Third Circuit's decision will have a restrictive effect on the ability of large corporate enterprises to reorganize. Substantive consolidation enables corporate debtor entities to successfully reorganize in an efficient and expedited fashion. For example, consolidation removes the need for (i) separate plans of reorganization, (ii) separate votes by creditors on a debtor-by-debtor or class-by-class basis, and (iii) the reconciliation of intercompany claims. *See Eastgroup Props.*, 935 F.2d at 248; *see also* Gilbert, *supra*, at 209-210. Many massive reorganizations have been predicated on substantive consolidation. To be sure, in some cases objections to consolidation were ultimately resolved, and the consolidations (or distributions predicated upon the economic equivalent of substantive consolidation, as in the *Enron* reorganization) thus became consensual. Under the decision below, however, such resolutions probably could not have been achieved,

because the Third Circuit's test would virtually eliminate any incentive for an objecting creditor to agree to consolidation.

Finally, substantive consolidation plays a central role in structured finance planning. As the law now stands – unclear and divided – contracting parties have little guidance as to how loans should be structured given the uncertain prospects of substantive consolidation. In *Augie/Restivo*, the Second Circuit noted the importance of this factor for lenders and also observed that "lenders' expectations are . . . important to the efficacy of credit markets." 860 F.2d at 518-19.

In sum, determinations regarding substantive consolidation affect matters of considerable and increasing importance to the bankruptcy system, tort victims and other claimants, multi-corporate enterprises, parties engaged in structured finance transactions, and the general public. This case presents a significant and welcome opportunity for this Court to bring the necessary uniformity and certainty to this area of law.

## III. THE COURT OF APPEALS INAPPROPRIATELY DISREGARDED THE DISTRICT COURT'S FINDINGS OF FACT, WHICH WERE NOT FOUND TO BE CLEARLY ERRONEOUS, AND IMPROPERLY PERFORMED ITS OWN FACT-FINDING

Not only did the court of appeals devise an overly restrictive test to deny substantive consolidation; it also disregarded the district court's findings of fact, even though it did not find them to be "clearly erroneous" as required by Federal Rule of Civil Procedure 52(a). The court of appeals erred by failing to defer, under the "clearly erroneous" standard mandated by Rule 52(a), to Judge Fullam's specific factual findings concerning the interrelationship of Owens Corning and its subsidiaries and the prepetition expectation of the Banks in obtaining guarantees.

In reviewing a district court's grant or denial of substantive consolidation, as in all cases, a court of appeals may set aside the district court's factual findings

only for clear error. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n.19 (3d Cir. 2004). The "clearly erroneous" standard mandates that "the appellate court must accept the factual determination of the fact finder unless that determination . . . is completely devoid of minimum evidentiary support displaying some hue of credibility." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3d Cir. 1992); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) (under Rule 52(a), all fact-findings are reviewed under the "clearly erroneous" standard even where the findings do not rest on credibility determinations). Even when the appellate court determines that the district court erred on a question of law, it still has no authority to make its own findings of fact. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982); *see also Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986) ("if [the court of appeals] was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. . . . But it should not simply have made factual findings on its own.").

The court of appeals here never even assessed whether the district court's fact-finding was "clearly erroneous." Instead, it engaged in what essentially was a *de novo* review – *i.e.*, it made "an original appraisal of all the evidence. . . ." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984). Even if the legal standard articulated by the Third Circuit were correct (which it is not), the court of appeals should have applied that standard to the facts as found by the district court, or it should have remanded for the district court to make additional findings. *Icicle Seafoods*, 475 U.S. at 714. Instead, however, consistent with its curious antipathy to substantive consolidation, the court of appeals held as it did on the basis of factual conclusions that are disputed and as to which there is abundant contrary evidence in the record. Indeed, the view of the facts suggested by the Third Circuit is directly contradicted by the district court's findings, each of which has ample support in the record as a whole.

For example, instead of determining whether there was sufficient evidence to uphold Judge Fullam's determination that the Banks did not rely on the separate credit of the relevant individual corporate entities, the court of appeals simply stated that his conclusion was "incorrect." App. 29. The court then substituted its own finding to conclude that "there is no serious dispute" as to the fact that the credit decision of the Banks was made in reliance upon the existence of separate corporate entities. App. 29, 31. But Rule 52(a) "requires that findings of fact not be set aside unless clearly erroneous" – not that they may be disregarded when they are viewed as "incorrect." *Pullman-Standard*, 456 U.S. at 287.

In addition, the first prong of the Third Circuit's test requires, for example, that the proponents of substantive consolidation demonstrate that "prepetition [the corporate entities] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity." App. 26. But Judge Fullam's factual findings essentially establish just such a conclusion. For example, he determined that:

> [a]ll of the subsidiaries were controlled by a single committee, from central headquarters, without regard to the subsidiary structure. . . . The officers and directors of the subsidiaries did not establish business plans or budgets, and did not appoint senior management except at the direction of the central committee. . . . The financial management of the entire enterprise was conducted in an integrated manner. . . . All of Owens Corning's financial reporting was done on a consolidated basis.

App. 50-51. Further, he determined that the Banks relied on the "overall credit of the entire Owens Corning enterprise," because (a) the Banks only received Owens Corning's consolidated financial information, (b) "[e]ach Bank's commitment was to the entire enterprise," and (c) the Banks "knew only that each guarantor had assets with a book value of $30 million or more [but] they had no information about the debts of those subsidiaries." App. 51. Nor

did the Banks even know from which entities they were receiving the guarantees. *Id.* In short, Judge Fullam found that substantive consolidation would in no way deprive the Banks (as they had argued) of the benefit of their bargain.

Nevertheless, stating merely that Judge Fullam's conclusions of the "substantial identity of [Owens Corning] and its subsidiaries and the Banks' reliance thereon" were "incorrect," the court of appeals inserted its own view of the facts into its decision-making calculus. Specifically, the court of appeals found that "[Owens Corning] and its subsidiaries comprise a multinational corporate group" within which "[e]ach subsidiary was a separate legal entity that observed governance formalities. Each had a specific reason to exist separately, each maintained its own business records, and intercompany transactions were documented." App. 3. Disregarding the district court's findings and the evidence upon which they were based, the court of appeals merely asserted that "there is no evidence of the prepetition disregard of the [Owens Corning] entities' separateness." With all due respect, the court of appeals' imposition of its own findings of fact on these issues was inappropriate and contravened Rule 52(a).

The courts of appeals for the various circuits from time to time must be reminded by this Court of their obligations under Rule 52(a) not to usurp the fact-finding function of the district courts. *See Pullman-Standard*, 456 U.S. at 287 ("Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."). It is not clear whether in this instance the Third Circuit's failure to follow the mandate of that Rule reflected its aversion to substantive consolidation or some other factor. In either event, however, that failure provides confirmation of the conclusion that the decision below went seriously astray and that review by this Court is warranted.

## CONCLUSION

The decision below both reflects and aggravates a serious conflict among the federal courts of appeals with respect to when the bankruptcy remedy of substantive consolidation may be ordered. Improperly ignoring the factual findings made by the district court despite Rule 52(a), the Third Circuit has imposed extreme restrictions on the ability of bankruptcy courts in that Circuit to order substantive consolidation. Those restrictions not only will prevent asbestos-related tort claimants from obtaining a full measure of relief in this matter; they will also make it virtually impossible in that Circuit for bankruptcy courts to order a remedy specifically designed to achieve equitable distribution of the estates of affiliated corporate debtors. Explicitly rejecting the "modern trend" favoring "liberal" invocation of substantive consolidation, the decision increases the uncertainty associated with this already confusing and important aspect of bankruptcy law and interferes with the ability of potential claimants to plan sensibly with regard to possible bankruptcy contingencies. Guidance from this Court with respect to substantive consolidation is sorely needed, and petitioner asks the Court to grant certiorari in order to bring uniformity to the broadly divergent law regarding that remedy that currently exists in the various circuits.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-4080

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IN RE: OWENS CORNING, a Delaware Corporation

CREDIT SUISSE FIRST BOSTON, as Agent for the prepetition bank lenders,

Appellant

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On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 00-cv-03837)
District Judge: Honorable John P. Fullam

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Argued February 7, 2005

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*

(Filed August 15, 2005)

[Counsel Omitted]

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OPINION OF THE COURT

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AMBRO, *Circuit Judge.*

We consider under what circumstances a court exercising bankruptcy powers may substantively consolidate affiliated entities. Appellant Credit Suisse First Boston ("CSFB") is the agent for a syndicate of banks (collectively, the "Banks")[1] that extended in 1997 a $2 billion unsecured loan to Owens Corning, a Delaware corporation ("OCD"), and certain of its subsidiaries. This credit was enhanced in part by guarantees made by other OCD subsidiaries. The District Court granted a motion to consolidate the assets and liabilities of the OCD borrowers[2] and guarantors in anticipation of a plan of reorganization.

The Banks appeal and argue that the Court erred by granting the motion, as it misunderstood the reasons for, and standards for considering, the extraordinary remedy of substantive consolidation, and in any event did not make factual determinations necessary even to consider its use. Though we reverse the ruling of the District Court, we do so aware that it acted on an issue with no opinion on point by our Court and differing rationales by other courts.

While this area of law is difficult and this case important, its outcome is easy with the facts before us. Among other problems, the consolidation sought is "deemed." Should we approve this non-consensual arrangement, the plan process would proceed as though assets and liabilities

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[1] Though CSFB is the named appellant, the real parties in interest are the Banks (which include CSFB). Thus, unless the context requires otherwise, CSFB and the Banks are referred to interchangeably in this opinion.

[2] For ease of reference, we refer hereinafter solely to OCD as the borrower.

of separate entities were merged, but in fact they remain separate with the twist that the guarantees to the Banks are eliminated. From this we conclude that the proponents of substantive consolidation request it not to rectify the seldom-seen situations that call for this last-resort remedy but rather as a ploy to deprive one group of creditors of their rights while providing a windfall to other creditors.

## I. Factual Background and Procedural History

### A. Owens Corning Group of Companies

OCD and its subsidiaries (which include corporations and limited liability companies) comprise a multinational corporate group. Different entities within the group have different purposes. Some, for example, exist to limit liability concerns (such as those related to asbestos), others to gain tax benefits, and others have regulatory reasons for their formation.

Each subsidiary was a separate legal entity that observed governance formalities. Each had a specific reason to exist separately, each maintained its own business records, and intercompany transactions were regularly documented.[3] Although there may have been some

[3] For example, Owens-Corning Fiberglass Technology, Inc. ("OCFT") was created as an intellectual property holding company to which OCD assigned all of its domestic intellectual property. OCFT licensed this intellectual property back to OCD in return for royalty payments. OCFT also entered into licensing agreements with parties outside of the OCD family of companies. This structure served to shield OCD's intellectual property assets (valued at over $500 million) from liability. OCFT operated as an autonomous entity. It prepared its own accounting and financial records and paid its own expenses from its separate bank accounts. OCFT had its own employees working at its

(Continued on following page)

"sloppy" bookkeeping, two of OCD's own officers testified

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Summit, Illinois plant, which contained machinery and equipment for research and development.

IPM, Inc. ("IPM") was incorporated as a passive Delaware investment holding company by OCD to consolidate the investments of its foreign subsidiaries. IPM shielded the foreign subsidiaries' investments from OCD liability and likewise shielded OCD from the liability of those foreign subsidiaries. OCD transferred ownership of its foreign subsidiaries to IPM and entered into a revolving loan agreement under which IPM loaned dividends from those subsidiaries to OCD. OCD paid interest on this revolving loan. IPM, like OCFT, entered into agreements with parties unaffiliated with the OCD group and operated as an autonomous entity. IPM also prepared its own accounting and financial records and paid its own expenses from its separate bank accounts. IPM's officers oversaw all investment activity and maintained records of investment activity in IPM subsidiaries.

Both OCFT and IPM operated outside of OCD's business units. Neither company received administrative support from OCD and both paid payroll and business expenses from their own accounts. Although summaries of their accounting ledgers were entered into OCD's centralized cash management system, the underlying records were created and maintained by the subsidiaries, not OCD. OCFT and IPM even had their own company logos and trade names.

Integrex was formed by OCD as an asbestos liability management company. For OCD's asbestos liability, Integrex ultimately processed only settled asbestos claims. The company also provided professional services (such as litigation management and materials testing) to the public. It had its own trade name and trademarked logo, its own business unit and its own financial team for business planning, and began several startup businesses that ultimately failed.

As discussed at Section I(B), *infra*, in 1997 OCD acquired Fibreboard Corporation. Subsequently, OCD formed Exterior Systems, Inc. ("ESI") as a separate entity after several subsidiaries of Fibreboard merged in 1999 in order to shield itself from successor liability for Fibreboard's asbestos products. Although the directors and managers of ESI and OCD overlapped, ESI observed corporate formalities in electing its directors and appointing its officers. In addition, it filed its own tax returns and kept its own accounting records. ESI held substantial assets, including over $1 billion in property, 20 factories, and between 150 and 180 distribution centers.

that the financial statements of all the subsidiaries were accurate in all material respects. Further, through an examination of the subsidiaries' books, OCD's postpetition auditors (Ernst & Young) have eliminated most financial discrepancies, particularly with respect to the larger guarantor subsidiaries.

**B. The 1997 Credit Agreement**

In 1997 OCD sought a loan to acquire Fibreboard Corporation. At this time OCD faced growing asbestos liability and a poor credit rating that hindered its ability to obtain financing. When CSFB was invited to submit a bid, it included subsidiary guarantees in the terms of its proposal. The guarantees gave the Banks direct claims against the guarantors for payment defaults. They were a "credit enhancement" without which the Banks would not have made the loan to OCD. All draft loan term sheets included subsidiary guarantees.

A $2 billion loan from the Banks to OCD closed in June 1997. The loan terms were set out primarily in a Credit Agreement. Among those terms were the guarantee provisions and requirements for guarantors, who were defined as "present or future Domestic Subsidiar[ies] . . . having assets with an aggregate book value in excess of $30,000,000." Section 10.07 of the Agreement provided that the guarantees were "absolute and unconditional" and each "constitute[d] a guarant[ee] of payment and not a guarant[ee] of collection."[4] A "No Release of Guarantor"

[4] This standard guarantee term means simply that, once the primary obligor (here OCD) defaults, the Banks can proceed against the guarantors directly and immediately without first obtaining a judgment

(Continued on following page)

provision in § 10.8 stated that "the obligations of each guarantor . . . shall not be reduced, limited or terminated, nor shall such guarantor be discharged from any such obligations, for any reason whatsoever," except payment and performance in full or through waiver or amendment of the Credit Agreement. Under § 13.05 of the Credit Agreement, a guarantor could be released only through (i) the unanimous consent of the Banks for the guarantees of Fibreboard subsidiaries or through the consent of Banks holding 51% of the debt for other subsidiaries, or (ii) a fair value sale of the guarantor if its cumulative assets totaled less than 10% of the book value of the aggregate OCD group of entities.

CSFB negotiated the Credit Agreement expressly to limit the ways in which OCD could deal with its subsidiaries. For example, it could not enter into transactions with a subsidiary that would result in losses to that subsidiary. Importantly, the Credit Agreement contained provisions designed to protect the separateness of OCD and its subsidiaries. The subsidiaries agreed explicitly to maintain themselves as separate entities. To further this agreement, they agreed to keep separate books and financial records in order to prepare separate financial statements. The Banks were given the right to visit each subsidiary and discuss business matters directly with that subsidiary's management. The subsidiaries also were prohibited from merging into OCD because both entities were required to survive a transaction under § 8.09(a)(ii)(A) of the Credit Agreement. This provision also prohibited

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against OCD and collecting against that judgment to determine if a shortfall from OCD exists.

guarantor subsidiaries from merging with other subsidiaries unless there would be no effect on the guarantees' value.

### C. Procedural History

On October 5, 2000, facing mounting asbestos litigation, OCD and seventeen of its subsidiaries (collectively, the "Debtors") filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*[5] Twenty-seven months later, the Debtors and certain unsecured creditor groups (collectively, the "Plan Proponents") proposed a reorganization plan (as amended, the "Plan") predicated on obtaining "substantive consolidation" of the Debtors along with three non-Debtor OCD subsidiaries.[6] Typically this arrangement pools all assets and liabilities of the subsidiaries into their parent and treats all claims against the subsidiaries as transferred to the parent. In fact, however, the Plan Proponents sought a form of what is known as a "deemed consolidation," under which a consolidation is deemed to exist[7] for purposes of valuing and satisfying creditor claims, voting for or against the

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[5] For convenience we refer hereinafter simply to "Bankruptcy Code § ___" when citing to a Code section.

[6] As the Plan's consolidation provisions affected so significantly voting on the Plan and the manner of proceeding at any confirmation hearing, the Plan Proponents filed a motion for a ruling on consolidation in anticipation of those events. "While not a routine procedure, it is not at all unusual for a plan proponent, or a plan opponent, to seek a determination prior to the plan confirmation hearing as to the legitimacy of a particular provision of a proposed plan." *In re Stone & Webster, Inc.*, 286 B.R. 532, 542 (Bankr. D. Del. 2002) (Walsh, J.).

[7] "[A]ll assets and liabilities of each Subsidiary Debtor . . . *will be treated as though* they were merged into and with the assets and liabilities of OCD. . . ." Plan § 6.1(b) (emphasis added).

Plan, and making distributions for allowed claims under it. Plan § 6.1. Yet "the Plan would not result in the merger of or the transfer or commingling of any assets of any of the Debtors or Non-Debtor Subsidiaries, . . . [which] will continue to be owned by the respective Debtors or Non-Debtors." Plan § 6.1(a). Despite this, on the Plan's effective date "all guarantees of the Debtors of the obligations of any other Debtor will be deemed eliminated, so that any claim against any such Debtor and any guarantee thereof . . . will be deemed to be one obligation of the Debtors with respect to the consolidated estate." Plan § 6.1(b). Put another way, "the Plan eliminates the separate obligations of the Subsidiary Debtors arising from the guarant[e]es of the 1997 Credit Agreement." Plan Disclosure Statement at A-9897.

The Banks objected to the proposed consolidation. Judge Alfred Wolin held a hearing on this objection.[8] He was subsequently recused from the Debtors' bankruptcy proceedings in light of *In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004), and Judge John Fullam was designated by the Chief Judge of our Court to replace him. Judge Fullam reviewed the transcripts and exhibits of the hearing, ordered additional briefing and on October 5, 2004, granted the consolidation motion in an order accompanied by a short opinion. *In re Owens Corning,* 316 B.R. 168 (Bankr. D. Del. 2004).

Judge Fullam concluded that there existed "substantial identity between . . . OCD and its wholly-owned

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[8] Pursuant to 28 U.S.C. § 157(d), Judge Wolin withdrew the reference of, *inter alia,* the consolidation motion to the Bankruptcy Court, thus making the District Court the judicial forum for the motion to proceed.

subsidiaries." *Id.* at 171. He further determined that "there [was] simply no basis for a finding that, in extending credit, the Banks relied upon the separate credit of any of the subsidiary guarantors." *Id.* at 172. In Judge Fullam's view, it was "also clear that substantive consolidation would greatly simplify and expedite the successful completion of this entire bankruptcy proceeding. More importantly, it would be exceedingly difficult to untangle the financial affairs of the various entities." *Id.* at 171. As such, he held substantive consolidation should be permitted, as not only did it allow "obvious advantages . . . [, but was] a virtual necessity." *Id.* at 172. In any event, Judge Fullam wrote, "[t]he real issue is whether the Banks are entitled to participate, *pari passu,* with other unsecured creditors, or whether the Banks' claim is entitled to priority, in whole or in part, over the claims of other unsecured creditors." *Id.* But this issue, he stated, "cannot now be determined." *Id.*

CSFB appeals on the Banks' behalf.

## II. Appellate Jurisdiction

The Plan Proponents moved to dismiss the appeal of the District Court's order granting consolidation on the ground that it is not a "final decision" from which an appeal may be taken pursuant to 28 U.S.C. § 1291.[9] We denied that motion prior to oral argument in this case and noted that our reasoning would follow in this opinion.

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[9] This provision, rather than 28 U.S.C. § 158(d), applies when the reference to a bankruptcy court is withdrawn.

Recognizing the "protracted nature of many bankruptcy proceedings, and the waste of time and resources that might result if immediate appeal [is] denied," *United States Trustee v. Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552, 556 (3d Cir. 1999), "[w]e apply a broader concept of 'finality' when considering bankruptcy appeals under § 1291 than we do when considering other civil orders under the same section." *In re Marvel Entm't Group, Inc.*, 140 F.3d 463, 470 (3d Cir. 1998). *See also Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV,* 229 F.3d 245, 250 (3d Cir. 2000) (noting that we impose a "relaxed standard" of finality because of unique considerations in bankruptcy cases); 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3926.2 at 274 (2d ed. 1996) (describing the "Third Circuit's especially flexible approach to bankruptcy finality"). Particularly relevant to our case is that "[t]o delay resolution of discrete claims until after final approval of a reorganization plan . . . would waste time and resources, particularly if the appeal resulted in reversal of a bankruptcy court order necessitating re-appraisal of the entire plan." *Clark v. First State Bank (In re White Beauty View, Inc.)*, 841 F.2d 524, 526 (3d Cir. 1988). We have also stressed that "issues central to the progress of the bankruptcy petition, those 'likely to affect the distribution of the debtor's assets, or the relationship among the creditors,' should be resolved quickly." *Century Glove, Inc. v. First Am. Bank,* 860 F.2d 94, 98 (3d Cir. 1988) (quoting *Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (In re Meyertech)*, 831 F.2d 410, 414 (3d Cir. 1987)).

We consider four factors in determining whether we should exercise jurisdiction over a bankruptcy appeal: "(1) [t]he impact on the assets of the bankrupt estate; (2) [the]

[n]ecessity for further fact-finding on remand; (3) [t]he preclusive effect of [the Court's] decision on the merits of further litigation; and (4) [t]he interest of judicial economy." *Buncher,* 229 F.3d at 250. All four factors weigh heavily in favor of our jurisdiction to consider the appeal of an order granting substantive consolidation. We thus join the four Courts of Appeal that have exercised jurisdiction in this context. *Alexander v. Compton (In re Bonham),* 229 F.3d 750, 762 (9th Cir. 2000); *First Nat'l Bank of El Dorado v. Giller (In re Giller),* 962 F.2d 796, 797-98 (8th Cir. 1992); *Eastgroup Props. v. S. Motel Ass'n,* 935 F.2d 245, 248 (11th Cir. 1991); and *Union Sav. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.),* 860 F.2d 515, 516-17 (2d Cir. 1988).

First, substantive consolidation has a profound effect on the assets of the consolidated entities. *See, e.g., Nesbit v. Gears Unlimited,* 347 F.3d 72, 86-87 (3d Cir. 2003). Second, there is no need for additional fact-finding to assess the propriety of an order granting substantive consolidation. In this case, for example, Judge Fullam reached his decision after "[a] four-day evidentiary hearing . . . was held by [his] predecessor, Judge Wolin," and after Judge Fullam reviewed "the transcript of the testimony and . . . the voluminous documentary record compiled in the course of the hearing, and [had] the benefit of post-trial briefing and argument." *In re Owens Corning,* 316 B.R. at 169. Third, a substantive consolidation order clearly has a preclusive effect on the merits of further litigation. In this case, the order precludes at least the Banks from asserting any right compromised or eliminated by virtue of the substantive consolidation. Last, the interests of judicial economy are best served by an immediate review of a substantive consolidation order. A later

reversal of such an order risks rendering meaningless any proceedings premised on the viability of a plan that calls for a consolidation (even if for only a temporary period).

Having concluded that we generally have jurisdiction to review appeals of substantive consolidation orders, we inquire whether anything is "different" about this case. The Plan Proponents argue that

> [t]he District Court Order lacks finality because it will be implemented, if at all, only following approval of a disclosure statement, the solicitation and vote of creditors as to the terms of the Proposed Plan, and, assuming the requisite vote, final confirmation of the Proposed Plan, before which creditors other than the Bank Debt Holders shall be given the opportunity to contest substantive consolidation. [Bankruptcy Code] § 1129. Thus, the District Court Order is conditioned upon plan confirmation. . . . The District Court Order has no present impact on the Debtors' estates and does not change the status quo.

Plan Proponents' Mot. to Dismiss at 10. In support of this contention, the Plan Proponents rely primarily on *In re A.S.K. Plastics, Inc.*, No. Civ. A. 04-2701, 2004 WL 1903322 (E.D. Pa. Aug. 24, 2004). Yet the conclusion that the Court lacked jurisdiction in *A.S.K. Plastics* was premised on the fact that "[u]nder no reasonable construction of the law could the Order's *conditional* consolidation be viewed as effect[ing] a 'practical termination' of anything." *Id.* at *2 (emphasis in original). That order "emphasized [that] . . . [w]hen a final reorganization plan [was] submitted to the Bankruptcy Court, [the party appealing the order] [was] free to object to consolidation." *Id.* In effect, the *A.S.K. Plastics* order was designed to postpone consideration of

the substantive consolidation issue until the plan confirmation stage.

That is not our case. For the Banks the District Court's determination is hardly conditional. It concluded "that substantive consolidation should be permitted." *In re Owens Corning*, 316 B.R. at 172. It made no provision for the Banks to reassert their objection to substantive consolidation at the plan confirmation stage; the order is final against them and is thus a practical termination of the substantive consolidation litigation.

Lastly, we address the Plan Proponents' argument that a substantive consolidation order must immediately take effect in order to be final for purposes of our jurisdiction. What they ignore is that the order approving substantive consolidation is the foundation on which the Plan is built. To assert that the actual substantive consolidation can only be implemented in conjunction with the effectiveness of an approved plan puts form over function. As the Banks point out, "[t]here is no support for the proposition that final orders lose their finality because of a delay in implementation." CSFB Opp'n to Mot. to Dismiss at 13. Certainly, decisions resolving most disputes (notably, disputes over the validity and value of claims) are not implemented until a plan is confirmed and payment under the plan becomes obligatory. Yet we exercise jurisdiction to review many of these decisions before that "final" order issues. *See, e.g., Hefta v. Official Comm. of Unsecured Creditors (In re Am. Classic Voyages Co.)*, 405 F.3d 127 (3d Cir. 2005). No reason exists for us to vary that routine here.

We conclude readily that we have appellate jurisdiction to consider the Banks' appeal under 28 U.S.C. § 1291.

## III. Substantive Consolidation

Substantive consolidation, a construct of federal common law, emanates from equity. It "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." *Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005). Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

While we have not fully considered the character and scope of substantive consolidation, we discussed the concept in *Nesbit*, 347 F.3d at 86-88 (surveying substantive consolidation case law for application by analogy to the Title VII inquiry of when to consolidate employers for the purpose of assessing a discrimination claim), and *In re Genesis Health Ventures*, 402 F.3d at 423-24 (examining, *inter alia*, whether a "deemed" consolidation for voting in connection with, and distribution under, a proposed plan of reorganization is a substantive consolidation for purposes of calculating U.S. Trustee quarterly fees under 28 U.S.C. § 1930(a)(6)). Other courts, including the Supreme Court itself in an opinion that spawned the concept of consolidation, have holdings more on point than heretofore have we. We begin with a survey of key cases, drawing from them when substantive consolidation may apply consistent with the principles we perceive as cabining its use, and apply those principles to this case.

### A. History of Substantive Consolidation

The concept of substantively consolidating separate estates begins with a commonsense deduction. Corporate disregard[10] as a fault may lead to corporate disregard as a remedy.

Prior to substantive consolidation, other remedies for corporate disregard were (and remain) in place. For example, where a subsidiary is so dominated by its corporate parent as to be the parent's "alter ego," the "corporate veil" of the subsidiary can be ignored (or "pierced") under state law. Kors, *supra,* at 386-90 (citing as far back as I. Maurice Wormser, *Piercing the Veil of Corporate Entity,* 12 Colum. L. Rev. 496 (1912)). Or a court might mandate that the assets transferred to a corporate subsidiary be turned over to its parent's trustee in bankruptcy for wrongs such as fraudulent transfers, Kors, *supra,* at 391, in effect bringing back to the bankruptcy estate assets wrongfully conveyed to an affiliate. If a corporate parent is both a creditor of a subsidiary and so dominates the affairs of that entity as to prejudice unfairly its other creditors, a court may place payment priority to the parent below that of the other creditors, a remedy known as equitable subordination, which is now codified in § 510(c) of the Bankruptcy Code. *See generally id.* at 394-95.

Adding to these remedies, the Supreme Court, little more than six decades ago, approved (at least indirectly

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[10] A term used by Mary Elisabeth Kors in her comprehensive and well-organized article entitled *Altered Egos: Deciphering Substantive Consolidation,* 59 U. Pitt. L. Rev. 381, 383 (1998) (hereinafter "Kors").

and perhaps inadvertently) what became known as substantive consolidation.[11] *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941). In *Sampsell* an individual in bankruptcy had transferred assets prepetition to a corporation he controlled. (Apparently these became the corporation's sole assets.) When the bankruptcy referee ordered that the transferred assets be turned over by the corporation to the individual debtor's trustee, a creditor of the non-debtor corporation sought distribution priority with respect to that entity's assets. In deciding that the creditor should not be accorded priority (thus affirming the bankruptcy referee), the Supreme Court turned a typical turnover/fraudulent transfer case into the forebear of today's substantive consolidation by terming the bankruptcy referee's order (marshaling the corporation's assets for the benefit of the debtor's estate) as "consolidating the estates." *Id.* at 219.

Each of these remedies has subtle differences. "Piercing the corporate veil" makes shareholders liable for corporate wrongs. Equitable subordination places bad-acting creditors behind other creditors when distributions are made. Turnover and fraudulent transfer bring back to the transferor debtor assets improperly transferred to another (often an affiliate). Substantive consolidation goes in a direction different (and in most cases further) than any of these remedies; it is not limited to shareholders, it affects distribution to innocent creditors, and it mandates more than the return of specific assets to the predecessor owner. It brings all the assets of a group of entities into a

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[11] The actual term was not used until 1967. *In re Commercial Envelope Mfg. Co.*, 3 Bankr. Ct. Dec. 647, 648 (Bankr. S.D.N.Y. 1977) (Babitt, J.).

single survivor. Indeed, it merges liabilities as well. "The result," to repeat, "is that claims of creditors against separate debtors morph to claims against the consolidated survivor." *In re Genesis Health Ventures*, 402 F.3d at 423. The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution.

Though the concept of consolidating estates had Supreme Court approval, Courts of Appeal (with one exception) were slow to follow suit. *Stone v. Eacho (In re Tip Top Tailors, Inc.)*, 127 F.2d 284 (4th Cir. 1942), *cert. denied*, 317 U.S. 635 (1942), was the first to pick up on *Sampsell's* new remedy.[12] Little occurred thereafter for more than two decades, until the Second Circuit issued several decisions – *Soviero v. National Bank of Long Island*, 328 F.2d 446 (2d Cir. 1964); *Chemical Bank New York Trust Co. v. Kheel (In re Seatrade Corp.)*, 369 F.2d 845 (2d Cir. 1966); *Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.)*, 432 F.2d 1060 (2d Cir. 1970); and *Talcott v. Wharton (In re Continental Vending Machine Corp.)*, 517 F.2d 997 (2d Cir. 1975) – that brought

[12] Another case oft-mentioned, and preceding both *Sampsell* and *Stone*, is *Fish v. East*, 114 F.2d 177 (10th Cir. 1940). Determining that a corporate subsidiary was simply the parent's "instrumentality," *id.* at 191, the Tenth Circuit affirmed the turnover of the subsidiary's assets to the parent. Though asserting that a "corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud," *id.*, "consolidation" was not mentioned. Indeed, as creditors of the subsidiary in *Fish* were given first priority as to its assets, *id.*, a complete consolidation did not occur. *Accord* Kors, *supra*, at 391 ("true consolidation" occurs only when creditors of consolidated entities share *pari passu*).

substantive consolidation as a remedy back into play and premise its modern-day understanding.

Other Circuit Courts fell in line in acknowledging substantive consolidation as a possible remedy. *See, e.g., FDIC v. Hogan (In re Gulfco Inv. Corp.)*, 593 F.2d 921, 927-28 (10th Cir. 1979); *Pension Benefit Guar. Corp. v. Ouimet*, 711 F.2d 1085, 1092-93 (1st Cir. 1983); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987); *Eastgroup*, 935 F.2d at 252; *In re Giller*, 962 F.2d at 799; *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 720 (6th Cir. 1992); *Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1106-07 (11th Cir. 1994); and *In re Bonham*, 229 F.3d at 771.

The reasons of these courts for allowing substantive consolidation as a possible remedy span the spectrum and often overlap. For example, *Stone* and *Soviero* followed the well-trod path of alter ego analysis in state "pierce-the-corporate-veil" cases. *Stone*, 127 F.2d at 287-89; *Soviero*, 328 F.2d at 447-48. *Accord In re Giller*, 962 F.2d at 798; *In re Gulfco Inv.*, 593 F.2d at 928-29. *Kheel* dealt with, *inter alia*, the net-negative practical effects of attempting to thread back the tangled affairs of entities, separate in name only, with "interrelationships . . . hopelessly obscured." 369 F.2d at 847. *See also, e.g., In re Augie/Restivo*, 860 F.2d at 518-19. *In re Continental Vending Machine* balanced the "inequities" involved when substantive rights are affected against the "practical considerations" spawned by "accounting difficulties (and expense) which may occur where the interrelationships of the corporate group are highly complex, or perhaps untraceable." 517 F.2d at 1001. *See also, e.g., In re Auto-Train*, 810 F.2d at 276; *Eastgroup*, 935 F.2d at 249; *In re Giller*, 962 F.2d at

799; *In re Reider,* 31 F.3d at 1108. *See generally* Kors, *supra,* at 402-06.

Ultimately most courts slipstreamed behind two rationales – those of the Second Circuit in *Augie/Restivo* and the D.C. Circuit in *Auto-Train.* The former found that the competing "considerations are merely variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, . . . or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. . . ." *In re Augie/Restivo,* 860 F.2d at 518 (internal quotation marks and citations omitted). *Auto-Train* touched many of the same analytical bases as the prior Second Circuit cases, but in the end chose as its overarching test the "substantial identity" of the entities and made allowance for consolidation in spite of creditor reliance on separateness when "the demonstrated benefits of consolidation 'heavily' outweigh the harm." *In re Auto-Train,* 810 F.2d at 276 (citation omitted).

Whatever the rationale, courts have permitted substantive consolidation as an equitable remedy in certain circumstances.[13] No court has held that substantive

[13] Indeed, they have not restricted the remedy to debtors, allowing the consolidation of debtors with non-debtors, *see, e.g., In re Bonham,* 229 F.3d at 765 (explaining that "[c]ourts have permitted the consolidation of non-debtor and debtor entities in furtherance of the equitable goals of substantive consolidation") (citing *In re Auto-Train,* 810 F.2d at 275-77; *In re Tureaud,* 59 B.R. 973, 974, 978 (N.D. Okla. 1986); *In re Munford,* 115 B.R. 390, 395-96 (Bankr. N.D. Ga. 1990)); *Soviero,* 328 F.2d 446, and in some cases consolidation retroactively (known also as *nunc pro tunc* consolidation), *see, e.g., In re Baker & Getty Financial Services,* 974 F.2d at 720-21; *Kroh Brothers Development Co. v. Kroh Brothers Management Co. (In re Kroh Brothers Development Co.),* 117 B.R. 499, 502 (W.D. Mo. 1989); *In re Tureaud,* 59 B.R. at 977-78; *see also*

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consolidation is not authorized,[14] though there appears

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*Auto-Train*, 810 F.2d at 277 (acknowledging that *nunc pro tunc* consolidations can occur, though not in that case).

In addition, though we do not permit the consolidation sought in this case, no reason exists to limit it under the right circumstances to any particular form of entity. (Indeed, this case involves corporations and limited liability companies.) *Accord* 2 *Collier on Bankruptcy* ¶ 105.09[1][c] (15th rev. ed. 2005).

[14] *See In re Bonham*, 229 F.3d at 765 (explaining that "the equitable power [of substantive consolidation] undoubtedly survived enactment of the Bankruptcy Code" and noting that "[n]o case has held to the contrary"); *but see In re Fas Mart Convenience Stores, Inc.*, 320 B.R. 587, 594 n.3 (Bankr. E.D. Va. 2004) (noting "there is persuasive academic argument that there is no authority in bankruptcy law for substantive consolidation") (citing Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 Ariz. St. L.J. 793, 810 (2003); J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427 (2000) (hereinafter "Tucker")).

Since the Supreme Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (federal district courts lack the equitable power to enjoin prejudgment transfers of assets, as such an equitable remedy did not exist at the time federal courts were created under the Judiciary Act of 1789), some argue that substantive consolidation, judge-made law not expressly codified in the Bankruptcy Code adopted in the late 1970s, does not qualify as an available equitable remedy. *See, e.g.*, Tucker, *supra* at 442-45. This argument has two facets. The first is that bankruptcy courts are limited to exercising only the equitable remedies extant at the time of the adoption of the Judiciary Act of 1789. As substantive consolidation is a relatively recent remedy nowhere contemplated in 1789, *Grupo Mexicano* by analogy bars substantive consolidation just as it does prejudgment preliminary injunctions forbidding asset transfers. *Id.* The second (and corollary) facet of the argument is that, as substantive consolidation is not specifically authorized in the Bankruptcy Code, authority to confer it can exist, if at all, only in § 105(a) of the Bankruptcy Code (bankruptcy courts "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title"). Even if § 105(a) "constitutes a direct, fresh grant of supplemental power to the bankruptcy courts, independent of the judicial

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power granted to the federal courts under title 28 [of the United States Code]," *id.* at 447, it can only implement powers already expressed in the provisions of the Bankruptcy Code. *Id.* at 447-48. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3d Cir. 2004) ("The general grant of equitable power contained in § 105(a) . . . must be exercised within the parameters of the Code itself."); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004) ("The power conferred by § 105 is one to implement rather than to override."). But for joint spouse estates in Bankruptcy Code § 302(a), consolidation is permitted only in the context of a confirmed plan of reorganization and the requirements that entails. Tucker, *supra,* at 449 (citing to, *inter alia,* Bankruptcy Code § 1123(a)(5)(C)).

The first facet of the argument is, at the outset, premature. Consolidating estates (indeed, consolidating debtor and non-debtor entities) traces to the Supreme Court's *Sampsell* decision in 1941. 313 U.S. at 219. What the Court has given as an equitable remedy remains until it alone removes it or Congress declares it removed as an option. *See In re Stone & Webster,* 286 B.R. at 540 (quoting *Official Comm. of Asbestos Claimants v. G-I Holdings, Inc.* (*In re G-I Holdings, Inc.*), Adv. No. 01-3065(RG) (Bankr. D.N.J. March 12, 2001) (Hearing Tr. at 71-2)).

In addition, at the core of *Grupo Mexicano* was the extent of general, unarticulated equity authority in the federal courts (which, the Court held, can only be justified by reference to 1789 equity authority). It was *not* a bankruptcy case. The extensive history of bankruptcy law and judicial precedent renders the issue of equity authority in the bankruptcy context different to such a degree as to make it different in kind. Notably, in the only two instances in which the word "bankruptcy" appears in Justice Scalia's majority opinion in *Grupo Mexicano,* he uses the *existence* of court authority in the bankruptcy context as a reason to support the conclusion that the district court did not have the authority under generalized equity powers to implement the remedy it imposed. First, he pointed out that *"[t]he law of fraudulent conveyances and bankruptcy was developed to prevent [the] conduct [at issue];* an equitable power to restrict a debtor's use of his unencumbered property before judgment was not." *Grupo Mexicano,* 527 U.S. at 322 (emphasis added). Second, he stressed that finding the authority to justify the District Court's remedy in generalized equity power would "add[ ], through judicial fiat, a new and powerful weapon to the creditor's arsenal[;] the new rule could radically alter the balance between debtor's and creditor's rights *which has been developed over centuries through many laws – including those relating to bankruptcy, fraudulent conveyances, and preferences." Id.* at 331 (emphasis added).

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nearly unanimous consensus that it is a remedy to be used "sparingly." *In re Augie/Restivo*, 860 F.2d at 518; *see also In re Bonham*, 229 F.3d at 767 (explaining that "almost every other court has noted [that substantive consolidation] should be used 'sparingly'") (citing *In re Flora Mir*, 432 F.2d at 1062-63).[15]

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In short, the Court's opinion in *Grupo Mexicano* acknowledged that bankruptcy courts *do* have the authority to deal with the problems presented by that case. One way to conceptualize this idea is to recognize that, had the company in *Grupo Mexicano* been in bankruptcy, the bankruptcy court would have had the authority to implement the remedy the district court lacked authority to order under general equity power outside the bankruptcy context.

As for the argument's second facet, it begins with a concession. Bankruptcy Code § 1123(a)(5)(C)'s very words allow for "consolidation of the debtor with one or more persons" pursuant to a plan "[n]otwithstanding any otherwise applicable non-bankruptcy law." *Accord* Tucker, *supra*, at 448-49. *See also In re Stone & Webster*, 286 B.R. at 540-43. Whether § 105(a) allows consolidation outside a plan is an issue we need not address – though that arguably is what the Plan Proponents propose by moving for a "deemed" consolidation – because, as we note below, consolidation, no matter how it is packaged, cannot pass muster in this case.

In this context, we also need not address the argument, made in the *Amicus Curiae* Brief of the Commercial Finance Association, that substantive consolidation fails the "best interests test" of Bankruptcy Code § 1129(a)(7) (a requirement for plan confirmation that each creditor that does not vote to accept the plan must receive or retain property under the plan at least equal to its recovery in a Bankruptcy Code Chapter 7 liquidation). *See generally In re Stone & Webster*, 286 B.R. at 544-46.

[15] Thus we disagree with the assertion of a "liberal trend" toward increased use of substantive consolidation – *e.g.*, *Eastgroup*, 935 F.2d at 248 (describing "a 'modern' or 'liberal' trend toward allowing substantive consolidation") (citing *In re Murray Indus., Inc.*, 119 B.R. 820, 828 (Bankr. M.D. Fla. 1990)); *In re Vecco Construction Industries, Inc.*, 4 B.R. 407, 409 (Bankr. E.D. Va. 1980).

## B. Our View of Substantive Consolidation

Substantive consolidation exists as an equitable remedy. But when should it be available and by what test should its use be measured? As already noted, we have commented on substantive consolidation only generally in *Nesbit*, 347 F.3d at 86-88, and *In re Genesis Health Ventures*, 402 F.3d at 423-24. The latter nonetheless left little doubt that, if presented with a choice of analytical avenues, we favor essentially that of *Augie/Restivo*. *Id.* at 423. The *Auto-Train* approach (requiring "substantial identity" of entities to be consolidated, plus that consolidation is "necessary to avoid some harm or realize some benefit," 810 F.2d at 276) adopts, we presume, one of the *Augie/Restivo* touchstones for substantive consolidation while adding the low bar of avoiding some harm or discerning some benefit by consolidation. To us this fails to capture completely the few times substantive consolidation may be considered and then, when it does hit one chord, it allows a threshold not sufficiently egregious and too imprecise for easy measure. For example, we disagree that "[i]f a creditor makes [a showing of reliance on separateness], the court may order consolidation . . . if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." *Id.* at 276 (citation omitted); *see also Eastgroup*, 935 F.2d at 249. If an objecting creditor relied on the separateness of the entities, consolidation cannot be justified *vis-à-vis* the claims of that creditor.[16]

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[16] This opens the question whether a court can order partial consolidation (such a consolidation order "could provide that . . . [a creditor relying on separateness] would receive a distribution equal to what [it] would have received absent consolidation and that the remainder of the assets and liabilities be consolidated.") Kors, *supra*, at 450-51. Because this theoretical issue is not before us – and in any

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In assessing whether to order substantive consolidation, courts consider many factors (some of which are noted in *Nesbit*, 347 F.3d at 86-88 nn. 7 & 9). They vary (with degrees of overlap) from court to court. Rather than endorsing any prefixed factors, in *Nesbit* we "adopt[ed] an intentionally open-ended, equitable inquiry . . . to determine when substantively to consolidate two entities." *Id.* at 87. While we mentioned that "in the bankruptcy context the inquiry focuses primarily on financial entanglement," *id.*, this comment primarily related to the hopeless commingling test of substantive consolidation. But when creditors deal with entities as an indivisible, single party, "the line between operational and financial [factors] may be blurred." *Id.* at 88. We reiterate that belief here. Too often the factors in a checklist fail to separate the unimportant from the important, or even to set out a standard to make the attempt. *Accord* Br. of Law Professors[17] as *Amici Curiae* at 11-12. This often results in rote following of a form containing factors where courts tally up and spit out a score without an eye on the principles that give the rationale for substantive consolidation (and why, as a result, it should so seldom be in play). *Id.* ("[D]iffering

event (i) facts bringing it to the fore are unlikely, *id.* at 451 ("If circumstances lead one party to rely on the single status of the one debtor, it is unlikely that other creditors are relying on the joint status of the two entities, especially as reliance must be reasonable."), and (ii) may present practical concerns depending on the facts of a particular case – we do not decide it in this case.

[17] They are Robert K. Rasmussen of Vanderbilt Law School, Barry Adler of the NYU School of Law, Susan Block-Leib of Fordham University School of Law, G. Marcus Cole of Stanford Law School, Marcel Kahan of the NYU School of Law, Ronald J. Mann of the University of Texas Law School, and David A. Skeel, Jr. of the University of Pennsylvania School of Law.

tests with . . . agreed . . . factors run the risk that courts will miss the forest for the trees. Running down factors as a check list can lead a court to lose sight of why we have substantive consolidation in the first instance . . . and often [to] fail [to] identify a metric by which [it] can . . . [assess] the relative importance among the factors. The . . . [result is] resort to ad hoc balancing without a steady eye on the . . . [principles] to be advanced. . . .").

What, then, are those principles? We perceive them to be as follows.

(1) Limiting the cross-creep of liability by respecting entity separateness is a "fundamental ground rule[ ]." Kors, *supra,* at 410. As a result, the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances calling equity (and even then only possibly substantive consolidation) into play.

(2) The harms substantive consolidation addresses are nearly always those caused by *debtors* (and entities they control) who disregard separateness.[18] Harms caused by creditors typically are remedied by provisions found in the Bankruptcy Code (*e.g.,* fraudulent transfers, §§ 548 and 544(b)(1), and equitable subordination, § 510(c)).

(3) Mere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make postpetition accounting

[18] Though creditors conceivably can cause debtors to conflate separate organizational forms, the specter of lender liability (which came to the fore in only the last two decades) makes this theoretical possibility all the more remote.

more convenient) is hardly a harm calling substantive consolidation into play.

(4) Indeed, because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this "rough justice" remedy should be rare and, in any event, one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code).

(5) While substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).

The upshot is this. In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity,[19] or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.[20]

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[19] This rationale is meant to protect in bankruptcy the prepetition expectations of those creditors. *Accord* Kors, *supra,* at 419. The usual scenario is that creditors have been misled by debtors' actions (regardless whether those actions were intentional or inadvertent) and thus perceived incorrectly (and relied on this perception) that multiple entities were one.

[20] This rationale is at bottom one of practicality when the entities' assets and liabilities have been "hopelessly commingled." *In re Gulfco Inv.*, 593 F.2d at 929; *In re Vecco,* 4 B.R. at 410. Without substantive consolidation all creditors will be worse off (as Humpty Dumpty cannot be reassembled or, even if so, the effort will threaten to reprise

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Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation. The second rationale needs no explanation. The first, however, is more nuanced. A *prima facie* case for it typically exists when, based on the parties' prepetition dealings, a proponent proves corporate disregard creating contractual expectations of creditors[21] that they were dealing with debtors as one indistinguishable entity. Kors, *supra*, at 417-18; Christopher W. Frost, *Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups*, 44 Hastings L.J. 449, 457 (1993). Proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity. Kors, *supra*, at 418-19. Creditor opponents of consolidation can nonetheless defeat a *prima facie* showing under the first rationale if they can prove they are adversely affected and actually relied on debtors' separate existence.[22]

*Jarndyce v. Jarndyce*, the fictional suit in Dickens' *Bleak House* where only the professionals profited). With substantive consolidation the lot of all creditors will be improved, as consolidation "advance[s] one of the primary goals of bankruptcy – enhancing the value of the assets available to creditors . . . – often in a very material respect." Kors, *supra*, at 417 (citation omitted).

[21] "[T]ort and statutory claimants, who, as involuntary creditors, by definition did not rely on anything in becoming creditors," Kors, *supra*, at 418, are excluded, leaving only those creditors who contract with an entity for whom consolidation is sought.

[22] As noted already, *supra* n.16, we do not decide here whether such a showing by an opposing creditor defeats totally the quest for consolidation or merely consolidation as to that creditor.

### C. Application of Substantive Consolidation to Our Case

With the principles we perceive underlie use of substantive consolidation, the outcome of this appeal is apparent at the outset. Substantive consolidation fails to fit the facts of our case and, in any event, a "deemed" consolidation cuts against the grain of all the principles.

To begin, the Banks did the "deal world" equivalent of "Lending 101." They loaned $2 billion to OCD and enhanced the credit of that unsecured loan indirectly by subsidiary guarantees covering less than half the initial debt. What the Banks got in lending lingo was "structural seniority" – a direct claim against the guarantors (and thus against their assets levied on once a judgment is obtained) that other creditors of OCD did not have. This kind of lending occurs every business day. To undo this bargain is a demanding task.

#### 1. No Prepetition Disregard of Corporate Separateness

Despite the Plan Proponents' pleas to the contrary, there is no evidence of the prepetition disregard of the OCD entities' separateness. To the contrary, OCD (no less than CSFB) negotiated the 1997 lending transaction premised on the separateness of all OCD affiliates. Even today no allegation exists of bad faith by anyone concerning the loan.[23] In this context, OCD and the other Plan Proponents cannot now ignore, or have us ignore, the very

[23] The bondholders do claim certain Banks misled them in purchasing OCD debt subsequent to the 1997 loan. But we know of no claim of wrong by the Banks in connection with the 1997 transaction.

ground rules OCD put in place. Playing by these rules means that obtaining the guarantees of separate entities, made separate by OCD's choice of how to structure the affairs of its affiliate group of companies, entitles a lender, in bankruptcy or out, to look to any (or all) guarantor(s) for payment when the time comes. As such, the District Court's conclusions of "substantial identity" of OCD and its subsidiaries, and the Banks' reliance thereon, are incorrect. For example, testimony presented by both the Banks and the Debtors makes plain the parties' intention to treat the entities separately. CSFB presented testimony from attorneys and bankers involved in negotiating the Credit Agreement that reflected their assessment of the value of the guarantees as partially derived from the separateness of the entities. As OCD concedes, these representatives "testified that the guarant[e]es were . . . intended to provide 'structural seniority' to the banks," and were thus fundamentally premised on an assumption of separateness. Debtors Ans. Br. at 26.

In the face of this testimony, Plan Proponents nonetheless argue that the Banks intended to ignore the separateness of the entities. In support of this contention, they assert, *inter alia,* that because the Banks did not receive independent financial statements for each of the entities during the negotiating process, they must have intended to deal with them as a unified whole. Because the Banks were unaware of the separate financial makeup of the subsidiaries, the argument goes, they could not have relied on their separateness.[24]

[24] Debtors make a similar argument on the basis of the Banks' failure to exercise their right to monitor the entities independently. For

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This argument is overly simplistic. Assuming the Banks did not obtain separate financial statements for each subsidiary, they nonetheless obtained detailed information about each subsidiary guarantor from OCD, including information about that subsidiary's assets and debt. Moreover, the Banks knew a great deal about these subsidiaries. For example, they knew that each subsidiary guarantor had assets with a book value of at least $30 million as per the terms of the Credit Agreement, that the aggregate value of the guarantor subsidiaries was over $900 million and that those subsidiaries had little or no debt. Additionally, the Banks knew that Fibreboard's subsidiaries (including the entities that became part of ESI) had no asbestos liability, would be debt-free post-acquisition and had assets of approximately $700 million.

Even assuming the Plan Proponents could prove prepetition disregard of Debtors' corporate forms, we

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much the same reasoning that follows in the text, we reject that argument as well.

We reject outright Debtors' claim that the Banks' alleged reliance on corporate separateness fails because they did not obtain a third-party legal opinion from counsel that substantive consolidation was unlikely to occur were OCD or the guarantors subject to bankruptcy. By custom and practice this type of counsel opinion is requested and given for newly formed entities whose "special purpose" is to obtain structured financing (*i.e.*, where "a defined group of assets . . . [are] structurally isolated, and thus serve as the basis of a financing. . . ." Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, *Structured Financing Techniques*, 50 Bus. Law. 527, 529 (1995)). It is customarily not given (nor even requested) for entities in existence for any significant period of time or set up for other than a structured financing transaction. *See* Tribar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 Bus. Law, 717, 726 & n.42 (1991).

cannot conceive of a justification for imposing the rule that a creditor must obtain financial statements from a debtor in order to rely reasonably on the separateness of that debtor. Creditors are free to employ whatever metrics they believe appropriate in deciding whether to extend credit free of court oversight. We agree with the Banks that "the reliance inquiry is not an inquiry into lenders' internal credit metrics. Rather, it is about the *fact* that the credit decision was made in reliance on the existence of separate entities. . . ." CSFB Opening Br. at 31 (emphasis in original).[25] Here there is no serious dispute as to that fact.

### 2. NO HOPELESS COMMINGLING EXISTS POSTPETITION

There also is no meaningful evidence postpetition of hopeless commingling of Debtors' assets and liabilities. Indeed, there is no question which entity owns which principal assets and has which material liabilities. Likely for this reason little time is spent by the parties on this alternative test for substantive consolidation. It is similarly likely that the District Court followed suit.

The Court nonetheless erred in concluding that the commingling of assets will justify consolidation when "the affairs of the two companies are so entangled that consolidation *will be beneficial.*" *In re Owens Corning,* 316 B.R. at 171 (emphasis added). As we have explained, commingling justifies consolidation only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of *every* creditor – that is, when every creditor

[25] Further, a creditor's lack of diligence is relevant only insofar as it bears on the credibility of its assertion of reliance on separateness.

will benefit from the consolidation. Moreover, the benefit to creditors should be from cost savings that make assets available rather than from the shifting of assets to benefit one group of creditors at the expense of another. Mere benefit to some creditors, or administrative benefit to the Court, falls far short. The District Court's test not only fails to adhere to the theoretical justification for "hopeless commingling" consolidation – that no creditor's rights will be impaired – but also suffers from the infirmity that it will almost always be met. That is, substantive consolidation will nearly always produce some benefit to some in the form of simplification and/or avoidance of costs. Among other things, following such a path misapprehends the degree of harm required to order substantive consolidation.

But no matter the legal test, a case for hopeless commingling cannot be made. Arguing nonetheless to the contrary, Debtors assert that "it would be practically impossible and prohibitively expensive in time and resources" to account for the voluntary bankruptcies of the separate entities OCD has created and maintained. Debtors Ans. Br. at 63. In support of this contention, Debtors rely almost exclusively on the District Court's findings that

> it would be exceedingly difficult to untangle the financial affairs of the various entities . . . [and] there are . . . many reasons for challenging the accuracy of the results achieved [in accounting efforts thus far]. For example, transfers of cash between subsidiaries and parent did not include any payment of interest; and calculations of royalties are subject to question.

*In re Owens Corning,* 316 B.R. at 171. Assuming *arguendo* that these findings are correct, they are simply not enough to establish that substantive consolidation is warranted.

Neither the impossibility of perfection in untangling the affairs of the entities nor the likelihood of some inaccuracies in efforts to do so is sufficient to justify consolidation. We find *R 2 Investments, LDC v. World Access, Inc. (In re World Access, Inc.)*, 301 B.R. 217 (Bankr. N.D. Ill. 2003), instructive on this point. In *World Access* the Court noted that the controlling entity "had no uniform guidelines for the recording of intercompany interest charges" and that the debtors failed to "allocate overhead charges amongst themselves." *Id.* at 234. The Court held, however, that those accounting shortcomings were "merely imperfections in a sophisticated system of accounting records that were conscientiously maintained." *Id.* at 279. It ultimately concluded that "all the relevant accounting data . . . still exist[ed]," that only a "reasonable review to make any necessary adjustments [was] required," and, thus, that substantive consolidation was not warranted. *Id.*

The record in our case compels the same conclusion. At its core, Debtors' argument amounts to the contention that because intercompany interest and royalty payments were not perfectly accounted for, untangling the finances of those entities is a hopeless endeavor. Yet imperfection in intercompany accounting is assuredly not atypical in large, complex company structures. *See, e.g.*, Lynn M. LoPucki, *The Myth of the Residual Owner*, 13 N.50 (2004), http://papers.ssrn.com/so13/papers.cfm?abstract_id=401160. For obvious reasons, we are loathe to entertain the argument that complex corporate families should have an expanded substantive consolidation option in bankruptcy. And we

find no reason to doubt that "perfection is not the standard in the substantive consolidation context." *In re World Access*, 301 B.R. at 279. We are confident that a court could properly order and oversee an accounting process that would sufficiently account for the interest and royalty payments owed among the OCD group of companies for purposes of evaluating intercompany claims – dealing with inaccuracies and difficulties as they arise and not in hypothetical abstractions.

On the basis of the record before us, the Plan Proponents cannot fulfill their burden of demonstrating that Debtors' affairs are even tangled, let alone that the cost of untangling them is so high relative to their assets that the Banks, among other creditors, will benefit from a consolidation.[26]

### 3. OTHER CONSIDERATIONS DOOM CONSOLIDATION AS WELL

Other considerations drawn from the principles we set out also counsel strongly against consolidation. First of all, holding out the possibility of later giving priority to the Banks on their claims does not cure an improvident grant of substantive consolidation. Among other things, the prerequisites for this last-resort remedy must still be met no matter the priority of the Banks' claims.

Secondly, substantive consolidation should be used defensively to remedy identifiable harms, not offensively

[26] For example, we simply cannot imagine that it would cost Debtors even 1% of the Banks' asserted $1.6 billion claim to account for the allegedly incalculable intercompany interest and royalty payments.

to achieve advantage over one group in the plan negotiation process (for example, by deeming assets redistributed to negate plan voting rights), nor a "free pass" to spare Debtors or any other group from proving challenges, like fraudulent transfer claims, that are liberally brandished to scare yet are hard to show. If the Banks are so vulnerable to the fraudulent transfer challenges Debtors have teed up (but have not swung at for so long), then the game should be played to the finish in that arena.[27]

But perhaps the flaw most fatal to the Plan Proponents' proposal is that the consolidation sought was "deemed" (*i.e.*, a pretend consolidation for all but the Banks). If Debtors' corporate and financial structure was such a sham before the filing of the motion to consolidate, then how is it that post the Plan's effective date this structure stays largely undisturbed, with the Debtors reaping all the liability-limiting, tax and regulatory benefits achieved by forming subsidiaries in the first place? In effect, the Plan Proponents seek to remake substantive consolidation not as a remedy, but rather a stratagem to "deem" separate resources reallocated to OCD to strip the Banks of rights under the Bankruptcy Code, favor other creditors, and yet trump possible Plan objections by the Banks. Such "deemed" schemes we deem not Hoyle.

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[27] The same sentiment applies to the argument of the bondholders that, subsequent to the 1997 loan to OCD, the Banks defrauded them in connection with a prospectus distributed with respect to a sale of OCD bonds underwritten by some of the Banks. If the bondholders have a valid claim, they need to prove it in the District Court and not use their allegations as means to gerrymander consolidation of estates.

## IV. Conclusion

Substantive consolidation at its core is equity. Its exercise must lead to an equitable result. "Communizing" assets of affiliated companies to one survivor to feed all creditors of all companies may to some be equal (and hence equitable). But it is hardly so for those creditors who have lawfully bargained prepetition for unequal treatment by obtaining guarantees of separate entities. *Accord Kheel*, 369 F.2d at 848 (Friendly, J., concurring) ("Equality among creditors who have lawfully bargained for different treatment is not equity but its opposite. . . ."). No principled, or even plausible, reason exists to undo OCD's and the Banks' arms-length negotiation and lending arrangement, especially when to do so punishes the very parties that conferred the prepetition benefit – a $2 billion loan unsecured by OCD and guaranteed by others only in part. To overturn this bargain, set in place by OCD's own pre-loan choices of organizational form, would cause chaos in the marketplace, as it would make this case the Banquo's ghost of bankruptcy.

With no meaningful evidence supporting either test to apply substantive consolidation, there is simply not the nearly "perfect storm" needed to invoke it. Even if there were, a "deemed" consolidation – "several zip (if not area) codes away from anything resembling substantive consolidation," *In re Genesis Health Ventures*, 402 F.3d at 424 – fails even to qualify for consideration. It is here a tactic used as a sword and not a shield.

We thus reverse and remand this case to the District Court.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4080

IN RE: OWENS CORNING, a Delaware Corporation

CREDIT SUISSE FIRST BOSTON, as Agent for the prepetition bank lenders,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 00-cv-03837)
District Judge: Honorable John P. Fullam

Argued February 7, 2005

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*

(Opinion filed August 15, 2005)

[Counsel Omitted]

**ORDER AMENDING PUBLISHED OPINION**

AMBRO, *Circuit Judge*

IT IS NOW ORDERED that the published Opinion in the above case filed August 15, 2005, be amended as follows:

On page 19, in the sixth line of the first full paragraph, delete the quotation marks and quoted phrase "[a] four-day evidentiary hearing . . . was held by [his] predecessor, Judge Wolin,". Insert in its place the clause "a thirteen-day evidentiary hearing was held by Judge Wolin" (with no surrounding quotation marks). The new sentence should read

> In this case, for example, Judge Fullam reached his decision after a thirteen-day evidentiary hearing was held by Judge Wolin, and after Judge Fullam reviewed "the transcript of the testimony, and . . . the voluminous documentary record compiled in the course of the hearing, and [had] the benefit of post-trial briefing and argument."

On page 47, delete the following sentence "*See, e.g.*, Lynn M. LoPucki, *The Myth of the Residual Owner*, 16 n.50 (2004), http://papers.ssrn.com/so13/papers.cfm?abstract_id=401160.".

On page 48, starting on the fifth line down, replace "*In re World Access*, 301 B.R. at 279." with "*Id.*"

On page 51, at the beginning of the last sentence in the last full paragraph, replace the word "It" with "Moreover, it".

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: August 23, 2005

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-4080

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IN RE: OWENS CORNING, a Delaware Corporation

CREDIT SUISSE FIRST BOSTON,
as Agent for the prepetition bank
lenders,

Appellant

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On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 00-cv-03837)
District Judge: Honorable John P. Fullam

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Argued February 7, 2005

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*

(Opinion filed August 15, 2005)

[Counsel Omitted]

**ORDER AMENDING PUBLISHED OPINION**

AMBRO, *Circuit Judge*

IT IS NOW ORDERED that the published Opinion in the above case filed August 15, 2005, be amended as follows:

On page 39, footnote 20, line six, replace "*v.*" with "*and*" so that the case name reads *Jarndyce and Jarndyce*.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: September 2, 2005

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-4080

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IN RE: OWENS CORNING, a Delaware Corporation

CREDIT SUISSE FIRST BOSTON,
as Agent for the prepetition bank
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On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 00-cv-03837)
District Judge: Honorable John P. Fullam

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Argued February 7, 2005

Before: ROTH, AMBRO and FUENTES, *Circuit Judges*

(Opinion filed August 15, 2005)

[Counsel Omitted]

## ORDER AMENDING PUBLISHED OPINION

AMBRO, *Circuit Judge*

IT IS NOW ORDERED that the published Opinion in the above case filed August 15, 2005, be amended as follows:

(1) In the sixth line in the second column of 419 F.3d at 206 (the last line of the carryover paragraph), delete "904" and in its place put "at 907" (thus, the cite should read "61 S.Ct. at 907.").

(2) At the end of note 12 on page 207, add the following new paragraph:

A case from our Court – *In re Pittsburgh Rys. Co.*, 155 F.2d 477 (3d Cir. 1946), *cert. denied sub nom. Phila. Co. v. City of Pittsburgh,* 329 U.S. 731 (1946) – cited *Stone, id.* at 484-85 n.15, in granting the request of the City of Pittsburgh to exercise bankruptcy jurisdiction over non-debtor companies controlled by the debtor Pittsburgh Railways Company. While guided by the practical need to "strip[] off" corporate "cloak[s]," *id.* at 484, in reorganizing Pittsburgh's transportation system, our Court pointed out that "[t]he reorganization court cannot indefinitely be called upon to provide . . . unification," *id.* at 481. In so doing, it emphasized that "we are in no way passing upon the fairness of any plan [of reorganization]." *Id.* at 485; *see also id.* at 481.

(3) In the sixth line of the first full paragraph at page 207, add "*Corp.*" after "*Ouimet*" and before ",".

(4) In the seventh line of the first full paragraph at page 207, add ", *cert. denied,* 464 U.S. 961 (1983)" after "(1st Cir. 1983)" and before ";" (thus, the combined changes in (2) above and this (3) should cause the cite to read: "*Pension Benefit Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1092-93 (1st Cir. 1983), *cert. denied,* 464 U.S. 961 (1983)").

(5) In the tenth line of the first full paragraph at page 207, delete "252" and in its place put

"248" (thus, the cite should read: "935 F.2d at 248").

(6) In the next-to-last line of the first full paragraph at page 207, delete "1106-07" and in its place put "1105-07" (thus, the cite should read: "31 F.3d 1102, 1105-07 (11th Cir. 1994)").

(7) In the second and third lines of the second column at page 207, delete "*In re Giller,* 962 F.2d at 798;" and add "*Corp.*" after "*Inv.*" and before the "," (thus, the cite should read: "*Accord In Re Gulfco Inv. Corp.,* 593 F.2d at 928-29.").

(8) In the next-to-last line of the carryover paragraph in the second column at page 207, delete "1108" and in its place put "1107-08" (thus, the cite should read, "31 F.3d at 1107-08.").

(9) In note 13 at page 208: (a) in the ninth line, delete "-77" after "275" and before ";"; (b) in the tenth line, add "Inc.," after "," and before "115"; (c) in the fourteenth line, add "*In re Bonham,* 229 F.3d at 769-71;" after "*e.g.,*" and before "*In re Baker*"; (d) in the fifteenth line, delete "*Financial Services*" and put in its place "*Fin. Servs.*"; (e) in the sixteenth and seventeenth lines, delete "*Brothers*" in the three places it appears and in its place put "*Bros.*"; and (f) in the nineteenth line, delete "*In re Tureaud,* 59 B.R. at 977-78;".

(10) In the fourteenth line from the bottom of the second column in note 14 at page 208, add "judicial" after "the" and before "power".

(11) In the fourth line from the bottom of the second column in note 14 at page 208, change "The" to "[T]he" after "(" and before "power".

(12) In the last sentence of the second paragraph of note 14 at page 208 (the last line on that page), delete "(a)" after "§ 302".

(13) In the sixth line in the first paragraph of the first column of note 14 at page 209, delete "904" and in its place put "at 907" (thus, the cite should read: "61 S.Ct. at 907.").

(14) In the tenth line from the bottom in the first column of note 14 at page 209, delete "1961" and in its place put "at 1970" (thus, the cite should read: "119 S.Ct. at 1970.").

(15) In the second line from the top in the second column of note 14 at page 209, delete "1961" and in its place put "at 1974" (thus, the cite should read: "119 S.Ct. at 1974.").

(16) In note 15 at page 209, (a) in the seventh line, delete the second closed parenthesis, that is, the closed parenthesis (")") after "(Bankr. M.D. Fla. 1990)"; (b) in the next-to-last line, change "*Construction*" to "*Constr.*" and "*Industries*" to *Indus.*"; and (c) add a second closed parenthesis in the last line after "(Bankr. E.D. Va. 1980)" (thus, the cite should read: "(citing *In re Murray Indus., Inc.,* 119 B.R. 820, 828 (Bankr. M.D. Fla. 1990); *In re Vecco Constr. Indus., Inc.,* 4 B.R. 407, 409 (Bankr. E.D. Va. 1980)).".

(17) In the tenth line from the bottom in the text of the second column at page 210, change "check list" to the single word "checklist".

(18) In the fourth line of note 20 at page 211, add "*Corp.*" after "*Inv.*" and before "," and add "*Constr. Indus.*" after "*Vecco*" and before "," (thus, the cite should read "*In re Gulfco Inv. Corp.,* 593

F.2d at 929; *In re: Vecco Constr. Indus.*, 4 B.R. at 410.").

(19) In the fourteenth line of the paragraph in the first column at page 212, add a "," after "*Risk*" and before "*and*".

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: October 12, 2005
nmb/cc: All Counsel of Record

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE.

| | |
|---|---|
| IN RE: | Chapter 11 |
| OWENS CORNING, et al., | Case Nos. |
| Debtors. | 00-3837 to 3854 (JPF) |

**MEMORANDUM AND ORDER CONCERNING SUBSTANTIVE CONSOLIDATION**

FULLAM, Sr. J. October 5, 2004

The Debtors, joined by most of the creditor groups, have presented and prosecuted a motion for substantive consolidation – i.e., a request that the assets of, and claims against, the Debtors and all subsidiaries and affiliated entities be consolidated and treated as a single unit in these bankruptcy proceedings. A consortium of banks represented by Credit Suisse First Boston strenuously opposes such consolidation. A four-day evidentiary hearing on this issue was held by my predecessor, Judge Wolin, in May, 2003. I have read the transcript of the testimony, and have reviewed the voluminous documentary record compiled in the course of the hearing, and have had the benefit of post-trial briefing and argument. I am now prepared to set forth my views on the subject.

## I. Background

Owens Corning and 17 of its wholly-owned subsidiaries jointly filed petitions for chapter 11 reorganization on October 5, 2000, and their respective bankruptcy proceedings have, in effect, been procedurally consolidated and are being jointly administered. All of the chapter 11 petitioners and their affiliated entities continue to carry

on business as debtors-in-possession. The principal litigants in this litigation include, in addition to the Debtors, the bank consortium represented by Credit Suisse First Boston; the Official Committee of Unsecured Creditors; a second committee or sub-committee of unsecured creditors representing the bondholders and trade creditors; Kensington International, Springfield Associates and Angelo Gordon and Company; the Official Committee of Asbestos Claimants; the Legal Representative for Future Claimants; and various individual asbestos claimants. To achieve an acceptable plan of reorganization, it will be necessary (1) to determine the value of the Debtors; (2) to determine the correct amounts of existing creditors' claims, and a reasonable estimate of future claims; (3) and to determine the correct allocation of values to be distributed to the various creditors. The absolute priority rule governs: no junior creditor may be paid unless senior creditors are paid in full, and all creditors in the same priority class must be treated alike.

## II. Discussion

The claim of the banks represented by Credit Suisse (hereinafter "the Banks") is for the unpaid balance of a series of loans made to Owens Corning and various of its subsidiaries pursuant to a credit agreement dated as of June 26, 1997, in which the Banks committed to lending a total of more than $2 billion to Owens Corning and five of its subsidiaries. Forty-three Banks made commitments in varying amounts ranging from $10 million to $100 million, and made those amounts available for revolving loans, competitive advance loans, swing line loans and letter of credit commitments which could be drawn upon from time to time by the borrowers.

The parent company, Owens Corning of Delaware (OCD), guaranteed the repayment of all loans made pursuant to the credit agreement, whether to itself or any subsidiary; and each major subsidiary (those with assets having a book value of $30 million or more) also guaranteed the repaymen. of all loans made pursuant to the credit agreement. It is this feature of cross-guarantees which the Banks rely upon as establishing that their claim, which, when the petition was filed, amounted to approximately $1.6 billion, is superior to the claims of all other creditors because it constitutes a direct claim against the parent company and each of the subsidiary guarantors, whereas the other creditors have direct claims against the parent company but only indirect claims against the subsidiaries, based upon the parent company's ownership of 100% of their stock. The Banks argue that, because of these differences, the Banks would be treated unfairly if substantive consolidation were to occur.

The question of when substantive consolidation is permissible has been the subject of much litigation, as well as learned discussion. At the hearing before Judge Wolin, all parties seemed to agree that the proper standard is that adopted by the D.C. Circuit in *Drabkin v. Midland-Ross Corp. (In re Autotrain Corp., Inc.)*, 810 F.2d 270 (D.C. Cir. 1987), and by the Eleventh Circuit in *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, 935 F.2d 245 (11th Cir. 1991). More recently, the Third Circuit Court of Appeals has addressed the question, in *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3rd Cir. 2003), *cert denied,* 124 S. Ct. 1714 (2004).

Although the actual question presented in the *Nesbit* case was whether two separate corporations should be regarded as a single employer for purposes of determining

the applicability of Title VII, the Third Circuit expressly adopted, as part of the test for that determination, the "factors Courts use in deciding whether substantively to consolidate two or more entities in the bankruptcy context." The Court added:

> "While these factors vary from circuit to circuit, the test at base seeks to determine whether two or more entities' affairs are so interconnected that they collectively cause the alleged discriminatory employment practice. More colloquially, the question is whether the 'eggs' – consisting of the ostensibly separate companies – are so scrambled that we decline to unscramble them. We note, however, that substantive consolidation is an equitable remedy and is difficult to achieve."

As noted by the *Nesbit* Court, the Second Circuit Court of Appeals, in *In re: Augie/Restivo Baking Co.*, 860 F.2d 515 (2d Cir. 1988), has summarized the requirements set forth in the reported decisions as establishing two fundamental principles: (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, and (2) whether the affairs of the two companies are so entangled that consolidation will be beneficial. The Ninth Circuit has also adopted this formulation. *See In re Bonham*, 229 F.3d 750, 766 (9th Cir. 2000).

The D.C. Circuit in the *Autotrain* case, and the Eleventh Circuit in *Eastgroup Properties,* have taken the position that if the proponents of consolidation establish (1) that there is substantial identity between the entities to be consolidated, and (2) that consolidation is necessary to avoid some harm or to realize some benefits, a *prima*

*facie* case for consolidation has been established, and the burden would then shift to the objecting creditor, to show (1) that it relied on the separate credit of one of the entities to be consolidated, and (2) that it will be prejudiced by substantive consolidation.

I have no difficulty in concluding that there is indeed substantial identity between the parent debtor OCD and its wholly-owned subsidiaries. All of the subsidiaries were controlled by a single committee, from central headquarters, without regard to the subsidiary structure. Control was exercised on a product-line basis. For example, the president of the insulating systems business managed all aspects of the production, marketing, and distribution of insulation products, regardless of whether those products were manufactured in a factory owned by OCD or by a foreign subsidiary. The officers and directors of the subsidiaries did not establish business plans or budgets, and did not appoint senior management except at the direction of the central committee (the "Natural Leadership Team"). Subsidiaries were established for the convenience of the parent company, primarily for tax reasons. All of the subsidiaries were dependent upon the parent company for funding and capital. The financial management of the entire enterprise was conducted in an integrated manner. No subsidiary exercised control over its own finances.

It is also clear that substantive consolidation would greatly simplify and expedite the successful completion of this entire bankruptcy proceeding. More importantly, it would be exceedingly difficult to untangle the financial affairs of the various entities. While it is true that, as stressed by the Banks, the Debtors have apparently expended large sums of money having accounting experts attempt to sort out, and balance, the financial affairs of

each entity, there are still many reasons for challenging the accuracy of the results achieved. For example, transfers of cash between subsidiaries and parent did not include any payment of interest; and calculations of royalties are subject to question.

I conclude, therefore, that the proponents of substantive consolidation have established a *prima facie* case. The next question is whether the Banks have proved that they relied upon the separate credit of the subsidiaries.

There can be no doubt that the Banks relied upon the overall credit of the entire Owens Corning enterprise. Each Bank's commitment was to the entire enterprise. The decision as to whether funds would be borrowed by the parent company, or by one or more of the subsidiaries, was made by the borrowers, not by the lenders. All of Owens Corning's financial reporting was done on a consolidated basis, and only that consolidated information was provided to the Banks.

It is also important to note that, in seeking and obtaining guarantees from the "substantial" subsidiaries, the Banks knew only that each guarantor had assets with a book value of $30 million or more; the Banks had no information about the debts of such subsidiaries.

In short, there is simply no basis for a finding that, in extending credit, the Banks relied upon the separate credit of any of the subsidiary guarantors. This is not to say that the guarantees were not important to the Banks. The guarantees greatly simplified the administration of the Credit Agreement, and protected the Banks from having their claim subordinated to subsequent indebtedness of the subsidiary guarantors.

But the very existence of these cross-guarantees is a further reason for approving substantive consolidation. Any guarantor held liable on its guarantee would have a right of indemnification against whichever entity or entities borrowed the money. It would be extremely difficult to sort out the inter-subsidiary claims.

Moreover, the Banks' claims against the subsidiary guarantors are not clear-cut: each subsidiary guarantee is enforceable only to the extent that enforcement would not give rise to a claim that a voidable transfer was being carried out.

For these reasons, I believe it is unrealistic to suppose that the Banks would have an easier time collecting their claims if consolidation were denied.

It should be noted that, in October 2002, the Debtors and various creditor groups instituted an adversary proceeding against the Banks seeking to invalidate the subsidiary guarantees as constituting fraudulent conveyances. That action has been stayed pending resolution of the substantive consolidation issue. Apparently, it was felt that there would be no need to resolve the fraudulent conveyance action unless substantive consolidation were denied. Whether that assessment is correct need not be addressed at this time.

## III. Conclusions

I have concluded that substantive consolidation should be permitted, not only because of its obvious advantages – indeed, because it is a virtual necessity – but also because I see no reason why the Banks' claim cannot be appropriately dealt with in a consolidated plan of

reorganization. The real issue is whether the Banks are entitled to participate, *pari passu,* with other unsecured creditors, or whether the Banks' claim is entitled to priority, in whole or in part, over the claims of other unsecured creditors. On the basis of the present record, I am not convinced that this is necessarily an all or nothing issue. That is, in the course of the plan-approval proceedings, the parties may come to a realization that the existence of the subsidiary guarantees does not warrant treating the Banks as if their claim was secured, and thus superior to the claims of all other unsecured creditors; but that the existence of the subsidiary guarantees might warrant treating the Banks' claim as if it were partially secured. Whether such a resolution would be fair and equitable to all cannot now be determined.

It does seem to me rather obvious that the interests of *all* parties would best be served by the prompt achievement of a reasonably acceptable plan of reorganization; that litigating every conceivable issue to finality would be unduly expensive; and that the parties would be well-advised to settle their differences.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE.

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|---|---|
| IN RE: | Chapter 11 |
| OWENS CORNING, et al., | Case Nos. |
| Debtors. | 00-3837 to 3854 (JPF) |

ORDER

AND NOW, this 5th day of October, 2004, IT IS ORDERED:

1. The Debtors' motion for substantive consolidation is GRANTED.

2. Counsel for the participating parties shall promptly, and repeatedly if necessary, meet for the purpose of attempting to achieve an agreed-upon plan of reorganization.

3. Counsel for the Debtors shall, and other parties may, report to this court within 30 days as to the status of settlement negotiations.

IT IS FURTHER ORDERED that counsel for the Debtors shall make sure that a copy of this order is sent promptly to those on the service list.

/s/ John P. Fullam
John P. Fullam, Sr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| OWENS CORNING, et al. | : | CIVIL ACTION |
| v. | : | NO. 04-00905 |
| CREDIT SUISSE FIRST BOSTON, et al. | : | (Bankr. No. 00-03837) |

MEMORANDUM AND ORDER

Fullam, Sr. J. March 31, 2005

In accordance with section 502(c) of the Bankruptcy Code, 11 U.S.C. § 502(c)(1), it is now necessary to estimate the amount of contingent or unliquidated claims against the Debtor, namely, the pending and future claims for personal injury or death caused by exposure to asbestos. When Owens Corning filed for bankruptcy in October 2000, there were approximately 188,000 pending claims. Approximately 60,000 of these claims had been tentatively resolved through negotiated settlements, but had not yet been paid (the "Contract Claims"). Approximately 128,000 claims remained to be disposed of. And, since asbestos-related diseases can take many years to develop, and since it can be expected that additional people will be exposed to asbestos in the future and may thereafter develop asbestos-related diseases, it is inevitable that many additional claims will be filed against the Debtor in the future.

Arriving at an appropriate estimate of the amount of these pending and future claims is of great significance to the parties to this reorganization, and the parties have understandably litigated the issues very thoroughly. The Asbestos Claimants Committee and the Futures Representative press for a high estimate, which will give their

constituencies greater voting power and greater relative participation in the fruits of the reorganization proceeding. The Banks and the Bondholders, conversely, argue for a low estimate. The Debtor, as the proponent of a plan of reorganization, does not argue for any particular valuation, but seeks to avoid obstacles to confirmation of a plan of reorganization.

The Court has been presented with the testimony of well-known and well-qualified experts in the field of claim evaluation. The Asbestos Claimants and Futures Representative rely on the testimony of Dr. Peterson and Dr. Rabinovitz. The Debtor's expert, called as a witness by the Banks, is Dr. Vasquez. And the Banks' witness is Dr. Dunbar. Their estimates of the future liability of Owens Corning (not including Fibreboard, which was purchased by Owens Corning in 1997) for all pending and future asbestos-related claims which have not yet been resolved range from a high of $11.1 billion (Dr. Peterson) to a low of $2.08 billion (Dr. Dunbar). Dr. Rabinovitz estimates a total of $8.15 billion, and Dr. Vasquez suggests a range of between $6.5 and $6.8 billion. The differences among these estimates reflect the experts' differing views concerning whether, and to what extent, Owens Corning's extensive pre-bankruptcy history of asbestos litigation can serve as a reliable guide to the validity and value of pending and future claims, and their differing estimates of the number and validity of future claims.

## General Comments

All of the experts who testified have had extensive experience in asbestos-related claims valuation. All are well qualified. It must be remembered, however, that they

are expressing their opinions, not verifiable facts. And it is important to bear in mind that each interested party can be expected to have selected an expert whose opinions will advance the cause of that party. Moreover, in the present case, the briefs of counsel are extensively devoted to exposing flaws in the expert testimony presented by other parties. Many of these criticisms are well taken.

What the briefs illustrate, beyond question, is that we are dealing with uncertainties, and are attempting to make predictions which are themselves based upon predictions and assumptions. Epidemiological studies can give us some information about the likely occurrence of asbestos-related diseases in the population in the future, and litigation history can suggest how many future illnesses are likely to produce claims against Owens Corning, but the margin for error as to both of these questions is substantial. Relatively minor variations in underlying assumptions can skew the end result enormously.

Tort System or Post-Bankruptcy Trust Values?

The first step in arriving at a reasonable estimation of the value of the unliquidated claims is to define precisely what is being estimated. Is it the value of the claims in the tort system, or, as the Banks argue, value measured by the procedures which will presumably be in place in administering the trust contemplated by the reorganization plan?

The claims being valued arise under state law, hence state law determines their validity and value. "The 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" *Raleigh v. Illinois Dep't of*

*Revenue,* 530 U.S. 15, 20 (2000), (quoting *Butner v. United States,* 440 U.S. 48, 54 (1979)). The same principle applies to estimation proceedings under § 502(c). *Bittner v. Borne Chem. Co., Inc.,* 691 F.2d 134, 135 (3d Cir. 1982). And claims are to be valued as of the petition date. *In re Brinns Cotton Mktg.,* 737 F.2d 1338 (5th Cir. 1984).

This necessarily means that the claims are to be appraised on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy.

The overall task at this point in the litigation is to determine what each class of creditors has at stake in the reorganization. In the case of the Banks and Bondholders, it is the amount specified in their various agreements. In the case of the asbestos claimants, it is the amount they had a legitimate right to expect as compensation for their injuries. We are not, at this time, deciding how much each claimant will actually be entitled to receive, but the total amount which the claimants, as a group, could legitimately have claimed as compensation, as of the petition date. The values of future claims should be estimated on the same basis – i.e., what their claims would have been worth in the tort system as it existed on the petition date. But the estimate of the number of such future claims should take into account changes likely to ensue as a result of the reorganization.

Litigation History

Owens Corning stopped producing asbestos-containing products in the early 1970s, and had begun placing warnings on its products several years earlier. But its principal asbestos-containing product, a high-temperature insulation material called Kaylo, was very widely distributed,

and was particularly "dusty" – i.e., capable of widespread air-borne distribution. As a result, Owens Corning was a high-profile target defendant. It had disposed of more than 330,000 asbestos claims pre-bankruptcy, and had compiled a voluminous, and very complete, data-bank of pertinent information. For a brief period, Owens Corning participated in the Asbestos Claims Facility, a joint effort by asbestos defendants to dispose of all pending asbestos litigation. When that joint effort collapsed, Owens Corning adopted a policy of vigorously defending against all claims, but that policy proved counter-productive; its asbestos liabilities sharply increased, and defense costs skyrocketed. Accordingly, beginning in late 1998, Owens Corning embarked upon its own individual National Settlement Program, in which it negotiated with all of the major law firms representing asbestos claimants in an attempt to achieve mass-settlements of all pending claims in their respective inventories. The National Settlement Program, of course, came to a halt when the bankruptcy petition was filed.

As a result of this litigation history, the information now available includes the following: (1) how juries evaluated various categories of asbestos claims; (2) the percentage of cases disposed of without payment; (3) how the various asbestos defendants viewed their comparative liability for the universe of asbestos claims throughout the nation (Owens Corning's share was approximately 20%); (4) what experienced asbestos litigators on both sides regarded as the appropriate settlement value of various types of asbestos-related claims; and (5) a rough approximation of the relationship between the number of persons affected by asbestos-related diseases and the number of

such persons who would make claims against Owens Corning (propensity to sue).

It does not necessarily follow, however, that it is safe to assume that these historical results can properly be extrapolated into the future. As the Banks have convincingly demonstrated, some of the past results have been skewed by factors which can and should be avoided in the future. The question to be resolved is the extent to which adjustments should be made to historical values to account for these probable changes.

The factors which are unlikely to be replicated include the following:

1. Venue-Shopping

Plaintiffs filed huge numbers of asbestos lawsuits in selected state jurisdictions (Mississippi, Texas, Southern Illinois) noted for "runaway" jury verdicts. Until recently, for example, plaintiffs could sue in Texas even though they themselves resided elsewhere, and had never been exposed to asbestos products in Texas.

2. Mass-Screenings

Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.

3. Erroneous X-ray Interpretations by Suspect B-readers

The interpretation of lung X-rays is more of an art than a science, and equally skilled B-readers can disagree as to the correct interpretation. Plaintiffs invariably selected B-readers who were prone to find asbestosis, whereas defendants tended to choose conservative B-readers. Certain pro-plaintiff B-readers were so biased that their readings were simply unreliable.

4. Over-Payment to "Unimpaired" Claimants

Juries tended to award some damages to plaintiffs who proved exposure to asbestos products, if there was some X-ray evidence of possible lung changes, even though the claimant had never experienced adverse symptoms. Defendants tended to make payments in settlement of such claims to avoid defense costs.

5. Group Lawsuits

In many instances, a large group of plaintiffs would be joined in a single lawsuit. The group would include both persons with mesothelioma or other serious diseases, and persons with minimal proof of liability and minimal or no symptoms. In such instances, the presence of the serious cases tended to result in higher verdicts or settlements for the "unimpaired" cases.

6. Global Settlements

The Banks assert that the global settlements negotiated in the National Settlement Program ("NSP") tended

to over-value the less meritorious cases (and, perhaps, to encourage law firm efforts to recruit more claimants).

7. Punitive Damages

The dollar amounts of verdicts and settlements pre-bankruptcy included, or may have been impacted by, punitive damages or the threat of such damages.

I am satisfied that the amounts of verdicts and settlements experienced pre-bankruptcy should be reduced to account for the impact of actual or threatened punitive damage awards. This not because the substantive law of jurisdictions which permit punitive damages is being ignored, but because, in bankruptcy, if punitive damages are recoverable at all, they must be accorded a lower priority than claims for compensatory damages (§ 726(a)(4) in Chapter 7 cases, applicable here pursuant to § 1129(a)(7) of the Bankruptcy Code). I recognize that confirmation of a reorganization plan over the objections of creditor group is not the issue before the court at this time. But if subordination of punitive damage claims is mandated in Chapter 7 liquidations, it seems entirely appropriate to subordinate such claims in the Chapter 11 setting.

Moreover, as a practical matter, it seems highly doubtful that, in today's tort system, punitive damages would be allowed in any substantial amount, in most jurisdictions, to deter tortious conduct which ended more than twenty years ago.

Adjusting the Forecast to Account for Changed Conditions

There is general agreement that the values assigned to valid claims for mesothelioma, lung cancer, and other cancers throughout Owens Corning's litigation history accurately reflect the values such claims will have in the future. The same is true for valid claims of asbestosis, but there is considerable dispute between the parties as to what constitutes a compensable claim for asbestosis. The Banks argue that, although it is generally understood that an X-ray reading of 1/0 or higher supports a diagnosis of asbestosis, the claim should not be compensable unless pulmonary function tests ("PFT") establish at least a 20% reduction in pulmonary function. They further assert that the X-ray findings should be confirmed by at least two independent B-readers, whereas, in the past, single readings by biased B-readers resulted in the payment of many claims which should not have been paid.

The record makes clear, however, that pulmonary function tests are not very reliable: standards are available only with respect to males, and, in any event, what is "normal" lung capacity varies greatly with size, physical condition, etc. Moreover, with the possible exception of Ohio, no state has amended its tort law to specify a PFT threshold for compensability of a claim.

With respect to X-ray readings, it is clear that, at the margins, equally qualified and impartial B-readers may reach different conclusions (a 1/0 reading means that it is just barely asbestosis; a 0/1 reading means that it is almost asbestosis; and the difference between the two is extremely subtle). Here, too, it must be remembered that a claim of asbestosis survives summary judgment if there is a diagnosis supported by a single B-reading.

On the other hand, in its NSP program, Owens Corning achieved a considerable measure of success in eliminating, or at least greatly reducing, claims which did not meet the compensability threshold now urged by the Banks. Although this Court does not have the authority to alter state tort law, and therefore cannot establish mandatory standards of compensability, I believe it is permissible to take into account the general realization of asbestos litigators that inadequately supported diagnoses of asbestosis will be unlikely to establish compensability and that significant monetary awards will be unlikely in the absence of some proof of actual impairment.

To the extent that, in the past, non-meritorious claims may have been generated as a result of intensive "marketing" efforts by law firms, statistics as to the number of claims filed cannot be directly extrapolated into the future, but should be discounted to some extent. That is, it is reasonable to suppose (1) that law firms will have less incentive, and therefore will be less likely, to engage in intensive marketing efforts in the future; and (2) that the widespread dissemination of information about the dangers of asbestos exposure has already occurred, and has presumably already achieved its maximum impact. All of the experts seem to agree that the incidence of asbestos-related disease has reached its maximum, and that there will be a gradual but steady decline of such cases in the future.

The Court's task at this juncture is to decide how well the expert witnesses have accorded appropriate weight to the various factors discussed above. In undertaking this comparative assessment, however, I prefer to avoid specific mathematical calculations: since mathematical precision cannot be achieved in the prediction being undertaken, it

is important that we not pretend to have achieved mathematical accuracy.

Conclusions as to the Testimony of the Experts

I have particular concerns about according much weight to the testimony of Dr. Dunbar. On almost every point, his testimony is completely at odds with the testimony of the other experts, equally qualified; and it seems that he has adopted every assumption which would lower the estimate, and has rejected every assumption which would substantially increase the estimate. And there are obvious flaws in his calculation of "dismissal rates." His conclusion that, in the current inventory of 128,000 claims, only about 17,000 will prove to be compensable cannot be accepted without totally disregarding the historical experience in asbestos litigation.

At the other extreme, I am constrained to reject several of the assumptions upon which Dr. Peterson bases his estimate. His prediction that the number of claims will continue to increase sharply for the next five years is based primarily upon the upsurge in filings as a result of the NSP – an upsurge which everyone else agrees was a temporary aberration. And, in my opinion, Dr. Peterson has failed adequately to take into account the changes in the asbestos litigation landscape which have already occurred and which will likely continue.

The opinions of Dr. Vasquez and Dr. Rabinovitz are, in my view, about equally persuasive. Both have attempted, and largely succeeded, in adjusting historical figures to reflect changed circumstances.

Dr. Rabinovitz has had extensive experience in estimating liabilities on behalf of insurance companies; I am satisfied her testimony is not affected by pro-plaintiff bias. I consider her estimate probably a little too high, however, because it does not adequately take into account the aging of the population, and the impact of aging upon both values and propensity to sue.

Dr. Vasquez may well have felt it necessary to minimize his estimate to some extent because of his earlier involvement in estimating Owens Corning's contingent liabilities for purposes of its reports to the SEC. Everyone agrees that it was appropriate, for SEC reporting purposes, to choose the lowest point in the range of possible estimates. Dr. Vasquez, it seems to me, would naturally be reluctant to deviate too greatly from his earlier estimate.

All in all, having carefully considered all of the testimony, having reviewed the exhibits, having read and re-read the opinions of the experts, I have concluded that the appropriate figure lies somewhere between Dr. Vasquez's high estimate and Dr. Rabinovitz's low estimate. I therefore, for purposes of compliance with § 502(c) of the Bankruptcy Code, estimate Owens Corning's total liability for asbestos-related injury or death (all pending and future claims, including the contract claims) at $7 billion. An Order to that effect follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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|---|---|---|
| OWENS CORNING, et al. | : | CIVIL ACTION |
| v. | : | NO. 04-00905 |
| CREDIT SUISSE FIRST BOSTON, et al. | : | (Bankr. No. 00-03837) |

ORDER

AND NOW, this 31st day of March, 2005, IT IS ORDERED:

That the total amount of contingent and unliquidated claims against Owens Corning for personal injury or death caused by exposure to asbestos (including pending claims, future claims, and contract claims) is estimated to total $7 billion.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-4080

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IN RE: OWENS CORNING, a Delaware Corporation

CREDIT SUISSE FIRST BOSTON, as
Agent for the prepetition bank lenders,

Appellant

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**Present**: SCIRICA, Chief Judge, SLOVITER, ROTH, McKEE, AMBRO, FUENTES, SMITH, and FISHER, Circuit Judges

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**SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC***

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The petitions for rehearing filed by Appellees – Official Representative of the Bondholders and Trade Creditors, and James J. McMonagle, the Legal Representative for the Future Claimants and the Official Committee of Asbestos Claimants – having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the Court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: September 28, 2005
nmb/cc: All counsel of record

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## DESIGNATION OF DISTRICT COURT JUDGE FOR SERVICE ON DISTRICT COURT

WHEREAS, in my judgment the public interest requires the designation and assignment of a District Judge to the United States District Court for the District of Delaware;

NOW, THEREFORE, pursuant to the authority vested in me by Title 28 U.S.C. §292(b), I do designate and assign the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania to sit on the United States District Court for the District of Delaware in the matter of In Re: Owens Corning, Dist. of Del. Bankruptcy No. 00-3837 which was previously assigned to the Honorable Alfred M. Wolin, Senior District Court Judge for the District of New Jersey by former Chief Judge Edward R. Becker;

The Honorable John P. Fullam shall sit for such time as may be required to complete the business of In Re: Owens Corning.

**A TRUE COPY:**

/s/ Pete S. [Illegible]
**ACTING CLERK**

/s/ Anthony J. Scirica
Chief Judge of the United States Court of Appeals for the Third Circuit

Dated: May 27, 2004

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | |
|---|---|
| IN RE: W.R. GRACE & CO., et al., Debtors. | : Chapter 11<br>: Case Nos. 01-1139 through 01-1200 |
| IN RE: USG CORPORATION, a Delaware Corporation, et al., Debtors. | : Chapter 11<br>: Case Nos. 01-2094 through 01-2104 |
| IN RE: OWENS CORNING, et al., Debtors. | : Chapter 11<br>: Case Nos. 00-3837 through 00-3854 |

This matter having been opened before the Court upon the Writs of Mandamus issued by the United States Court of Appeals for the Third Circuit to this Court on May 17, 2004, in the matters captioned in the Court of Appeals In re Kensington International Limited & Springfield Associates, L.L.C., C.A. No. 03-4212, In re D.K. Acquisition Partners, L.P., et alia, C.A. No. 03-4526, and In re USG Corporation, C.A. No. 04-1468; and those Writs of Mandamus commanding this Court to issue an Order recusing itself from further proceedings in the above-captioned, administratively consolidated chapter 11 cases

IT IS this 24th day of May 2004

ORDERED that this Court is hereby recused from all further proceedings in the above-captioned, chapter 11 cases, including all adversary proceedings arising in those chapter 11 cases.

/s/ Alfred M. Wolin

Alfred M. Wolin, U.S.D.J.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| In re:<br>OWENS CORNING, et al.,<br>Debtors. | Chapter 11<br>Case No. 00-3837 to 3854 (JFK)<br>(Jointly Administered) |
| OWENS CORNING, et al.,<br>Plaintiffs,<br>v.<br>CREDIT SUISSE FIRST BOSTON, et al.,<br>Defendants. | Adv. Proc. No. A-02-5829 (JFK)<br>ORDER |

**This Order affects the chapter 11 cases-in-chief and the adversary proceeding.**

**CASE MANAGEMENT ORDER RE: 1) PARTIAL WITHDRAWAL OF THE REFERENCE; 2) FILING OF A PLAN OF REORGANIZATION; AND 3) DISPOSITION OF THE "BANK GUARANTEE" AND "SUBSTANTIVE CONSOLIDATION" LITIGATION**

The Court having held a case management and status conference on December 20, 2002, with the assistance and participation of the Honorable Judith K. Fitzgerald, U.S.B.J.; and the parties having made certain representations regarding their intentions with respect to further proceedings in the above-captioned administratively consolidated chapter 11 cases, including that the debtor

intends shortly to file a plan of reorganization which will include a motion to substantively consolidate the related cases (hereinafter the Substantive Consolidation Motion), and that the parties anticipate motion practice in the adversary proceeding captioned *Owens Corning et alia v. Credit Suisse First Boston et alia*, Adversary Proceeding No. 02-5829 (hereinafter the Bank Guarantee Adversary); and good cause appearing

IT IS this 23rd day of December 2002

ORDERED that pursuant to 28 U.S.C. § 157 and the Order of this Court dated December 10, 2001, the reference of this case to the United States Bankruptcy Court, the Honorable Judith K. Fitzgerald presiding, is hereby withdrawn with respect to the Bank Guarantee Adversary and with respect to the Substantive Consolidation Motion, and it is further

ORDERED that the period within which the debtors have the exclusive right to file a plan of reorganization is hereby extended to January 17, 2003, and the debtors shall file their plan of reorganization on or before that date, and it is further

ORDERED that the Court will hold a joint trial on the Bank Guarantee Adversary and a hearing on the Substantive Consolidation Motion, to commence on April 1, 2003, at 10:00 a.m. at the Martin Luther King Courthouse in Newark, New Jersey, and it is further

**Motion Practice**

ORDERED that Designated Members of the Official Committee of Unsecured Creditors (the "Designated Members")[1] shall file an amended motion for an Order permitting them to intervene and to file a complaint in intervention in the Bank Guarantee Adversary, on or before December 31, 2002, and it is further

ORDERED that any motion to dismiss the Bank Guarantee Adversary shall be filed on or before January 10, 2003, and any response to a motion to dismiss shall be filed on or before January 16, 2003, and it is further

ORDERED that the parties shall confer and arrange a briefing schedule for the Substantive Consolidation motion as may be mutually agreeable, provided however that the briefing shall be complete and all papers in support of or opposition to the motion shall be received by the Court no later than 4:00 p.m. February 28, 2003, and it is further

**Mediation**

ORDERED that the Honorable Judith K. Fitzgerald, U.S.B.J., is hereby appointed Settlement Judge and Professor Francis McGovern is appointed Mediator for the matters for which the reference to the Bankruptcy Court has been withdrawn by this Order, provided however, that no party shall communicate to Judge Fitzgerald pursuant to this appointment on any issue for which the Court has not withdrawn the reference from her, and it is further

[1] The Court adopts the definition of "Designated Members" set forth in footnote one of the Designated Members' original motion to intervene, Docket No. 8.

ORDERED that, to assist with the efforts of Judge Fitzgerald and Professor McGovern, the Court makes the following provisions

1. The debtors will circulate a draft of their proposed plan of reorganization, together with a draft of the Substantive Consolidation Motion, on or before January 3, 2003. In the event that the foregoing papers do not adequately set forth the debtors' position on the Substantive Consolidation Motion, the debtors shall also simultaneously circulate a letter setting forth their position with the draft plan and motion.

2. Any party that does not agree with the debtors' position on substantive consolidation shall circulate a letter setting forth their position in opposition to or variance from the debtors' position on or before January 10, 2003.

3. The debtor may circulate a letter replying to the arguments raised in any other party's letter on or before January 16, 2003.

4. The position letters circulated pursuant to this paragraph shall be no more than five pages in length and shall be circulated to Judge Fitzgerald and Professor McGovern by overnight courier except as they may direct otherwise and to all interested parties by the same method.

and it is further

ORDERED that the parties shall appear at 9:00 a.m. on January 20 and 24, 2003, Courtroom A, 54th Floor, U.S. Steel Building, 600 Grant Street, Pittsburgh, Pennsylvania, for mediation before Judge Fitzgerald and Professor McGovern and it is further

**Discovery**

ORDERED that discovery in preparation for the trial scheduled to begin April 1, 2003, shall be conducted under the Federal Rules of Civil Procedure subject to the following provisos

1. The parties may conduct multiple depositions simultaneously.

2. No party need obtain leave of the Court to conduct more than ten depositions notwithstanding the limitation of Fed. R. Civ. P. 30(a)(2)(A). This provision shall be without prejudice to the right of any party to object on the ground that the number of depositions sought constitutes a hardship.

3. The seven hour limitation of Fed. R. Civ. P. 30(d)(2) will be strictly enforced;

and it is further

ORDERED that William A. Drier, Esq., of Norris, McLaughlin & Marcus, Bridgewater, New Jersey, is hereby appointed Special Master in the Fraudulent Conveyance Proceedings, and it is further

ORDERED that the Special Master shall hear disputes arising out of discovery matters only, subject to further Order of the Court, and it is further

ORDERED that practice before the Special Master shall be governed by such rules as he may direct, provided however that

1. Counsel shall confer among themselves in good faith to resolve any dispute before presenting it to the Special Master.

2. The Special Master may hear testimony and the arguments of counsel by any means he may deem appropriate, including without limitation by telephone conference, and announce his ruling orally, which announcement shall start the time within which any objection must be filed as further set forth in this Order.

3. The ruling of the Special Master shall be final and binding on the parties unless a party whose rights are affected by that ruling files a written objection with the Court within five calendar days of its announcement, provided however that any party intending to object must first contact the chambers of the Court by telephone for further instructions on how to proceed.

4. The Special Master shall, as soon as practicable following the announcement of a ruling, prepare a written report to the Court setting forth those findings of fact and conclusions of law upon which that ruling is based, provided however that the parties may waive the necessity of a written report should no objection be forthcoming.

5. Upon the objection of any party filed in conformance with this Order, this Court shall review the ruling and report of the Special Master *de novo*;

and it is further

ORDERED that, to the extent this Order may be inconsistent with Bankruptcy Rule 9031, that rule will be deemed suspended with the consent of all parties if no party objects in writing to this paragraph within five business days of the date of this Order.

Dated: December 23, 2002 /s/ Alfred M. Wolin
ALFRED M. WOLIN,
U.S.D.J.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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|---|---|
| IN RE | Chapter 11 |
| OWENS CORNING, et al., | Case Nos. 00-03837 (JKF) |
| Debtors. | Jointly Administered |
| | Related to Docket No. 2717 |

**AGREED-UPON ORDER APPOINTING LEGAL REPRESENTATIVE FOR FUTURE CLAIMANTS**

Upon the application, dated July 20, 2001 (the "Application")[1], of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), pursuant to sections 105, 327 and 524(g)(4)(B)(i) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et. seq.* (the "Bankruptcy Code"), for the appointment of James J. McMonagle as legal representative for future claimants, *nunc pro tunc* to June 12, 2001; and the Court having determined that the relief requested in the Application is in the best interest of the Debtors, their estates, their creditors and other parties-in-interest; and upon the record of these chapter 11 cases; and after due deliberation thereon; and good cause appearing therefor; it is hereby

FOUND THAT:

a. Notice of the Application was good and sufficient under the particular circumstances and no other or further notice is or shall be required;

[1] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Application.

b. Good and sufficient cause exists for the appointment of a Legal Representative for Future Claimants;

c. The relief requested in the Application is appropriate pursuant to section 524(g)(4)(B)(i) of the Bankruptcy Code; it is

ORDERED THAT:

1. The Application is GRANTED in its entirety.

2. James J. McMonagle is hereby appointed, *nunc pro tunc* to June 12, 2001, as the legal representative (the "Future Representative") of any and all persons described in section 524(g)(4)(B)(i) of the Bankruptcy Code (the "Future Claimants") who may assert demands (as that term is defined in section 524(g)(5) of the Bankruptcy Code) against one or more of the Debtors, including without limitation Owens Corning and Fibreboard Corporation.

3. The Future Representative shall have standing under section 1109(b) of the Bankruptcy Code to be heard as a party-in-interest in all matters relating to the Debtors' chapter 11 cases, and shall have such powers and duties of a committee as set forth in 11 U.S.C. § 1103 as are appropriate for a Future Representative.

4. The Future Representative shall be compensated, at the rate of $450 per hour, in accordance with the Agreed Amended Administrative Compensation Order, Pursuant To Sections 105(a) And 331 Of The Bankruptcy Code, Establishing Revised Procedures For Interim Compensation And Reimbursement Of Expenses Of Professionals (the "Agreed Administrative Compensation Order") entered in these cases.

5. The Future Representative may employ attorneys and other professionals consistent with sections 327 and 1103 of the Bankruptcy Code, subject to prior approval of this Court and pursuant to the Agreed Amended Administrative Compensation Order.

6. The Future Representative shall not be liable for any damages, or have any obligations other than as prescribed by orders of this Court; *provided, however*, that the Future Representative may be liable for damages caused by his wilful misconduct or gross negligence. The Future Representative shall not be liable to any person as a result of any action or omission taken or made by the Future Representative in good faith. The Debtors shall indemnify, defend and hold the Future Representative harmless from any claims by any party against the Future Representative arising out of or relating to the performance of his duties as Future Representative, *provided however*, that the Future Representative, shall not have such indemnification rights if a court of competent jurisdiction determines pursuant to a final and non-appealable order that the Future Representative is liable upon such claim as a result of wilful misconduct or gross negligence. If, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order and no longer subject to appeal), and (ii) the entry of an order closing these chapter 11 cases, the Future Representative believes that he is entitled to payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution and/or reimbursement obligations under this Order, including without limitation the advancement of defense costs, the Future Representative must file an application therefor in this Court, and the Debtors may not pay any such amounts to

the Future Representative before the entry of an order by this Court approving the payment. The preceding sentence is intended to specify the period of time under which this Court shall have the jurisdiction over any request for fees and expenses by the Future Representative for indemnification, contribution or reimbursement and is not a limitation on the duration of the Debtors' obligation to indemnify the Future Representative. In the event that a cause of action is asserted against the Future Representative arising out of or relating to the performance of his duties as Future Representative, the Future Representative shall have the right to choose his own counsel.

7. The Future Representative and his counsel shall be entitled to receive all notices and pleadings which are served upon the Official Creditors' Committee and the Asbestos Claimants Committee and their respective counsel pursuant to any and all orders entered in these chapter 11 cases, including, without limitation, (i) the Agreed Administrative Compensation Order, and (ii) any and all orders authorizing the Debtors to obtain postpetition financing.

8. This Court shall retain jurisdiction to interpret, enforce and implement the terms and provisions of the Order and to resolve any disputes arising hereunder.

Dated: September 28, 2001

/s/ Judith K. Fitzgerald
The Honorable Judith K. Fitzgerald
United States Bankruptcy Judge

(4)

(3)

Nos. 05-827, 05-941



# In the Supreme Court of the United States

JAMES J. MCMONAGLE,
THE LEGAL REPRESENTATIVE FOR FUTURE CLAIMANTS,

*Petitioner,*

v.

CREDIT SUISSE FIRST BOSTON, AS AGENT, *ET AL.*,

*Respondents.*

OFFICIAL REPRESENTATIVES OF THE BONDHOLDERS AND TRADE CREDITORS OF DEBTORS OWENS CORNING, *ET AL.*,

*Petitioners,*

v.

CREDIT SUISSE FIRST BOSTON, AS AGENT, *ET AL.*,

*Respondents.*

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR RESPONDENT CREDIT SUISSE FIRST BOSTON, AS AGENT, IN OPPOSITION

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* *Counsel of Record*

## QUESTION PRESENTED

Whether, under any valid application of the judicially developed bankruptcy doctrine of substantive consolidation, Owens Corning and seventeen of its subsidiaries that admitted having substantially correct financial statements showing each entity's assets and liabilities can propose a valid chapter 11 reorganization plan depriving their bank lenders of the subsidiaries' individual guarantees of $1.6 billion of bank loans, by "deeming," as to the banks only, that the subsidiaries would be merged into Owens Corning, thereby overriding the Bankruptcy Code to extinguish the guarantees and reducing the banks' aggregate bankruptcy principal distributions from $1.6 billion to $600 million.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

This matter arises out of a motion filed in bankruptcy court. The movants were petitioner James J. McMonagle; the Official Committee of Asbestos Claimants; and debtors Owens Corning *et al.*, more fully identified in 05-827 Pet. iii n.1. The motion was also supported by petitioners Official Representatives of the Bondholders and Trade Creditors of Debtors Owens Corning, the membership of which is identified in 05-941 Pet. ii and iii. The opponent of the motion was respondent Credit Suisse First Boston, as Agent for the prepetition bank lenders. Although the motion was filed in the first instance in the bankruptcy court, it was not decided in that court, but rather was decided in the first instance by the district court. *See* 05-827 Pet. App. 8 n.8. On appeal to the Third Circuit, the appellant was respondent Credit Suisse First Boston, as Agent for the prepetition bank lenders, and the appellees were the movants and motion supporters identified above. The listing of parties in 05-827 Pet. iii is accurate except to the extent it refers to appellees as "defendants/ appellees" and appellant as "plaintiff/appellant."

In this Court, McMonagle and the Official Representatives of the Bondholders and Trade Creditors of Debtors Owens Corning are petitioners; the Official Committee of Asbestos Claimants is a respondent under Rule 12.6 and has filed a brief in this Court as a respondent supporting petitioners; and debtors Owens Corning *et al.* are respondents under Rule 12.6.

Respondent is Credit Suisse, Cayman Islands Branch, formerly known as Credit Suisse First Boston. It is a branch of Credit Suisse, which is a wholly owned subsidiary of Credit Suisse Group, the shares of which are publicly traded on the Swiss Stock Exchange. No publicly held corporation owns 10% or more of the stock of Credit Suisse Group.

Credit Suisse, Cayman Islands Branch, is Agent for a syndicate of lenders to Owens Corning. The current members of that syndicate include Bear Stearns & Co. Inc. and UBS AG, both of which have issued publicly traded common stock. The

current members of the lending syndicate also include Credit Suisse, Cayman Islands Branch, Bank of America, N.A., Citibank, N.A., Citigroup Financial Products, Inc., Deutsche Bankers Trust Co., Goldman Sachs Credit Partners, L.P., JP Morgan Chase Bank, Lehman Commercial Paper, Merrill Lynch Credit Products, and Morgan Stanley Emerging Markets, whose parent entities have issued publicly traded common stock. Those parent entities are Credit Suisse Group, Bank of America Corp., Citigroup, Inc., Deutsche Bank Group, Goldman Sachs Group, Inc., JPMorgan Chase & Co., Lehman Brothers, Inc., Merrill Lynch & Co., Inc., and Morgan Stanley, respectively. Credit Suisse, Cayman Islands Branch, is not aware of any other current members of the lending syndicate that have issued, or are subsidiaries of entities that have issued, publicly traded equity and does not maintain or have ready access to such information.

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## BRIEF FOR RESPONDENT CREDIT SUISSE FIRST BOSTON, AS AGENT, IN OPPOSITION

Nonconsensual substantive consolidation is an extraordinary remedy, devised by judges – despite the absence of any specific statutory authorization for disregard of the corporate form in this manner – to deal with extreme situations in bankruptcy cases. Rather than compute how much each debtor-entity owes each of its creditors, the remedy treats separate corporations as if they were merged, thereby treating all creditors as if they were creditors of one combined entity. Here, Owens Corning attempted to radicalize this extraordinary remedy in three respects. First, it requested substantive consolidation only on a "deemed" (make-believe) basis, thereby leaving the corporate structure unchanged after bankruptcy while computing distributions to Owens Corning's bank lenders as if the subsidiaries had been merged into Owens Corning so the banks would lose the benefits of the guarantees they received from twelve of the subsidiaries. Second, Owens Corning specified this make-believe substantive consolidation would be used only to compute (and thereby diminish) the banks' distributions and not to compute any other creditor's distribution from any of the subsidiaries. Third, Owens Corning requested this relief while admitting its financial statements substantially correctly specified that each entity's assets and liabilities and that the banks required the guarantees when they committed to making the loan.

No decision from any court of appeals has ever granted such radical relief in similar circumstances. Moreover, no decision of any court of appeals has ever granted a less radicalized substantive consolidation when its proponents admitted that each entity's assets and liabilities were known and the objecting creditor had shown its recognition of separate entities by requiring separate guarantees. This case provided the Third Circuit an opportunity to state comprehensively its view of the substantive consolidation doctrine, including its view of the

hazards of following or misconstruing stray language in opinions of other courts. *See* 05-827 Pet. App. 23-27. To reject Owens Corning's proposed substantive consolidation, however, the court did not need to place itself in conflict with any other court besides the district court it was reversing. Rather, as bankruptcy professors Robert K. Rasmussen, Barry Adler, Susan Block-Lieb, G. Marcus Cole, Marcel Kahan, Ronald J. Mann, and David A. Skeel, Jr., advised the Third Circuit in an amicus brief filed December 29, 2004 (at 1), "no appellate court to date has confronted a situation similar to the one presented in this case." *See also* 05-827 Pet. App. 24-25 & n.17 (agreeing with other aspects of professors' brief).

Significantly, every court of appeals cites with approval the decisions from the Second Circuit ruling that substantive consolidation is granted sparingly and only where necessary to remedy harm caused by fraud, hopeless commingling of assets, or an expectation by all creditors that they were dealing with one entity. None of those factors exists here. Some courts of appeals are more specific than others as to exactly which harms or benefits justify substantive consolidation. But the case at bar is not on the fringes. It comes nowhere close to satisfying any circuit's requirements.

There is no conflict among the courts of appeals with respect to the "easy" issue decided by the Third Circuit. 05-827 Pet. App. 2. Finally, petitioners' assertion that the Third Circuit inappropriately disregarded the district court's findings of fact is untrue. The district court wrote a seven-page decision of which a few scattered sentences purport to sum up more than 10,000 pages of trial record. As the Third Circuit showed, the district court simply did not account for the undisputed individual facts relating to the different subsidiaries.

## STATEMENT

### A. Relevant Facts

1. <u>Owens Corning's Operations and Corporate Structure</u>. Owens Corning is a Fortune 200 multinational company with an elaborate and carefully maintained corporate structure. Each

subsidiary of Owens Corning, the parent Delaware corporation ("OCD") was a separate legal entity that scrupulously observed corporate formalities[1] and had a legitimate reason to exist separately. The subsidiaries were formed for a variety of business and strategic objectives. Some subsidiaries were free-standing, operational companies in their own right; some subsidiaries were formed to limit asbestos-related liability concerns; some were formed to gain tax and other business benefits; and others were formed for regulatory reasons. The financial affairs of each subsidiary were properly documented.[2] Each subsidiary maintained its own business records, and intercompany transactions were regularly documented. While OCD, as the parent corporation, owns all the stock of its subsidiaries and operated its enterprise in an integrated manner, the legal structure of its subsidiary corporations was respected at all times.

Examples of the major subsidiaries are as follows: Integrex was a freestanding entrepreneurial company designed to market litigation management, materials testing, and other services to third parties. CA App. 601-02, 760, 824-28, 831-32, 5421, 5423, 5426, 5427, 5438, 5821, 7813; CA Conf. App. 898: 109a, 239, 239a, 245, 266, 308, 356, 357a, 358, 367-68, 370-71, 380, 413, 426, 430a, 448-57j. Exterior Systems, Inc. ("Exterior") was formed after several subsidiaries of Fibreboard Corporation

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1 *See, e.g.*, CA Conf. App. 983: 33, 37-38, 39, 41-42, 47-48, 108, 310-11, 316-18, 355-58; CA Conf. App. 1022: 8, 8a, 8b, 9, 10, 13-14, 19-20, 26, 32-46, 50-61, 339; CA Conf. App. 898: 1, 1K, 2, 3, 6-10, 20-22, 151, 156, 158, 554, 655, 660, 661, 663-64; CA Conf. App. 830: 5-20, 199-02, 208-12, 225-32, 233, 234, 235-42, 243-45, 250-52, 253-55, 257, 258, 259-60, 261, 263-69, 271-73, 276-85, 286-95, 299, 300-05, 306-08, 311-15, 318, 320-23, 324, 327, 339-54, 355-58, 361.

2 CA App. 465-67, 692-93, 1303-04, 2954, 2958, 3002, 3004, 3006, 3008, 3010, 3012, 3018, 3029, 3262, 3652, 4579, 5162, 5200, 5310, 6391, 6499, 6612, 6760, 7057, 7126.1, 7823, 7862, 7951, 7959, 8365, 8429, 8523, 8927-37, 9111-13, 9346-50, 9666-9738, 9744, 9953-54, 9959-59.1, 9975-76, 9978, 9979, 10087, 10090-91; CA Conf. App. 898: 137, 139-40, 144-45, 174-75, 330, 541-42, 544; CA Conf. App. 1022: 296, 304-312, 328; CA Conf. App. 983: 52, 81-84, 268, 339-41; CA Conf. App. 830: 363, 379, 395, 412, 427, 434, 437.